DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-71
Title: Arizona, et al., Petitioners
v.
The Inter Tribal Council of Arizona, Inc., et al.
Docketed: July 18, 2012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-17094, 08-17115)
Decision Date: April 17, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 16 2012	Petition for a writ of certiorari filed. (Response due August 17, 2012)
Aug 8 2012	Order extending time to file response to petition to and including August 31, 2012, for all respondents.
Aug 14 2012	Brief amicus curiae of American Unity Legal Defense Fund filed.
Aug 15 2012	Motion for leave to file amicus brief filed by Mountain States Legal Foundation.
Aug 17 2012	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed.
Aug 17 2012	Brief amici curiae of Alabama, et al. filed.
Aug 20 2012	Waiver of right of Coconino County Respondents to respond filed.
Aug 29 2012	Brief of respondents The Inter Tribal Council of Arizona, Inc., et al. in opposition filed.
Aug 31 2012	Brief of respondents Jesus M. Gonzalez, et al. in opposition filed.
Sep 11 2012	Reply of petitioners Arizona, et al. to the response of Inter-Tribal Council of Arizona, et al. filed.
Sep 11 2012	Reply of petitioners Arizona, et al. to the response of Jesus Gonzalez, et al. filed.
Sep 12 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 2 2012	Supplemental brief of petitioners Arizona, et al. filed. (Distributed)
Oct 4 2012	Supplemental brief of respondents Jesus M. Gonzalez, et al. filed. (Distributed)
Oct 9 2012	DISTRIBUTED for Conference of October 12, 2012.
Oct 15 2012	Motion for leave to file amicus brief filed by Mountain States Legal Foundation GRANTED.
Oct 15 2012	Petition GRANTED.
Oct 29 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner Arizona, et al.
Nov 19 2012	Joint motion of Gonzalez, et al. and Arizona to correct case caption filed by respondents Jesus M. Gonzalez, et al.

Nov 20 2012	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 7, 2012.
Nov 29 2012	Response to motion to correct case caption from counsel for Inter Tribal Council of Arizona, Inc., et al.
Nov 30 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents Inter Tribal Council of Arizona, Inc., et al.
Dec 3 2012	Reply of Gonzalez, et al. and Arizona, et al. to Inter Tribal Council of Arizona, Inc., et al. response to motion to correct case caption filed.
Dec 7 2012	The time to file respondents' briefs on the merits is extended to and including January 14, 2013.
Dec 7 2012	Joint appendix filed. (Statement of costs filed)
Dec 7 2012	Brief of petitioners Arizona, et al. filed.
Dec 7 2012	Brief of petitioners Twenty-six County Recorders and County Election Directors filed.
Dec 11 2012	Brief amicus curiae of American Unity Legal Defense Fund filed.
Dec 13 2012	Brief amicus curiae of Kris W. Kobach, Kansas Secretary of State filed.
Dec 14 2012	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed.
Dec 14 2012	Brief amicus curiae of Landmark Legal Foundation filed.
Dec 14 2012	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Dec 14 2012	Brief amici curiae of Alabama, et al. filed.
Dec 14 2012	Brief amicus curiae of Mountain States Legal Foundation filed.
Dec 14 2012	Brief amicus curiae of State Senator Russell Pearce filed.
Dec 14 2012	Brief amici curiae of American Civil Rights Union, et al. filed.
Dec 14 2012	Brief amicus curiae of Members of Congress filed.
Dec 19 2012	Consent to the filing of amicus curiae briefs, in support of eitiher party or of neither party, received from counsel for the Gonzalez respondents.
Dec 20 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Coconino County, Arizona et al.
Dec 26 2012	Motion DISTRIBUTED for Conference of January 11, 2013.
Jan 7 2013	SET FOR ARGUMENT ON Monday, March 18, 2013
Jan 10 2013	CIRCULATED.
Jan 14 2013	Motion to correct case caption DENIED.
Jan 14 2013	Brief of respondents The Inter Tribal Council of Arizona, Inc., et al. filed. (Distributed)
Jan 14 2013	Brief of respondents Jesus M. Gonzalez, et al. filed (Appendix to brief bound separately.)
Jan 18 2013	Record from U.S.C.A. for 9th Circuit is electronic.
Jan 18 2013	Record from U.S.D.C. for District fo Arizona is electronic.
Jan 22 2013	Brief amicus curiae of the United States filed. (Distributed)
Jan 22 2013	Brief amicus curiae of League of Women Voters filed. (Distributed)
Jan 22 2013	Brief amici curiae of Constitutional Law Professors filed. (Distributed)
Jan 22 2013	Brief amici curiae of Election Administrators filed. (Distributed)
Jan 22 2013	Brief amici curiae of Members of Congress filed. (Distributed)
Jan 22 2013	Brief amici curiae of Overseas Vote Foundation, et al. filed. (Distributed)

Jan 22 2013	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. (Distributed)
Jan 22 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 22 2013	Brief amicus curiae of Community Voter Registration Organizations filed. (Distributed)
Jan 22 2013	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Jan 22 2013	Brief amicus curiae of Asian American Legal Defense and Education Fund filed. (Distributed)
Jan 22 2013	Brief amici curiae of LatinoJustice PRLDEF, et al. filed. (Distributed)
Feb 13 2013	Reply of petitioners Arizona, et al. filed. (Distributed)
Feb 19 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 18 2013	Argued. For petitioners: Thomas C. Horne, Attorney General of Arizona, Phoenix, Ariz. For respondents: Patricia Millett, Washington, D. C.; and Sri Srinivasan, Deputy Solicitor General, Department of Justice, Washington, D. C. (for Untied States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-71

In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE, and BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Defendants-Appellees below, are the State of Arizona, Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constable, in her official capacity as Yavapai County Election Director; Laura Dean-Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official capacity as Graham County Election Director; Donna Hale, in her official capacity as La Paz County Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Linda Haught Ortega, in her official capacity as Gila County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; Lenora Fulton, in her official capacity as Apache County Recorder; Juanita Simmons, in her official capacity as

PARTIES TO THE PROCEEDINGS – Continued

Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Susie" Sainz, in her official capacity as Santa Cruz County Recorder; Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County Recorder; and Sue Reynolds, in her official capacity as Yuma County Election Director. Other parties who have been replaced by succession in office are: Janice K. Brewer, now Governor of Arizona, who was replaced by Ken Bennett; Thomas Schelling, who was replaced by Juanita Simmons; Joan McCall, who was replaced by Carol Meier; Ana Wayman-Trujillo, who was replaced by Leslie Hoffman; Patti Madril, who was replaced by Sue Reynolds; Susan Hightower Marler, who was replaced by Robyn S. Poucette; Gilberto Hoyos, who was replaced by Steve Kizer; Linda Haught Ortega, who was replaced by Sadie Tomerlin; Dixie Mundy, who was replaced by Linda Eastlick; and Penny Pew, who was replaced by Angela Romero.

Respondents, who were Plaintiffs-Appellants below, are The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; People for the American Way Foundation; Hopi Tribe; Bernie

PARTIES TO THE PROCEEDINGS – Continued

Abeytia; Luciano Valencia; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote; Common Cause; and Georgia Morrison-Flores.

Other parties before the court of appeals in their official capacities were Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Laurette Justman, Navajo County Recorder; and Kelly Dastrup, former Navajo County Election Director.

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona, Secretary of State Ken Bennett, and thirteen Arizona Counties (collectively referred to as "the State" or "Arizona") respectfully petition for a writ of certiorari to review the U.S. Court of Appeals for the Ninth Circuit's judgment in this case.

OPINION BELOW

The merits decision of the en banc panel of the Ninth Circuit Court of Appeals is reported at 677 F.3d 383 (9th Cir. 2012) (Pet. App. 1c-122c.) The order of the U.S. District Court for the District of Arizona is included in the Appendix at 1e to 10e.

JURISDICTION

The court of appeals entered judgment on April 17, 2012. (Pet. App. 4c.) This petition has been filed within ninety days of April 17, 2012. Accordingly, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 4, Clause 1 of the U.S. Constitution provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This case also involves the National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-7, which is reproduced in the Appendix at 1h-28h.

The case also involves Arizona Revised Statutes ("A.R.S.") Section 16-166. Section 16-166(F) provides as follows:

> F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
>
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

(The complete text of A.R.S. § 16-166 is reproduced in the Appendix at 46h-50h.)

STATEMENT OF THE CASE

A. The National Voter Registration Act.

Congress enacted the National Voter Registration Act ("the NVRA") in 1993 to "establish procedures that will increase the number of eligible citizens who register to vote for Federal office," "make it possible for Federal, State, and local governments to implement [it] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1)-(4) (Pet. App. 2h.)

The NVRA required the U.S. Election Assistance Commission ("EAC") to develop the Federal Mail Voter Registration Form ("Federal Form") in consultation with the States. *See* 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h-27h). The NVRA directs the States to "accept and use" the Federal Form when submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2) (Pet. App. 7h.) Since the inception of the NVRA, Arizona has used and accepted the Federal Form for voter registration. (Appellees' Supplemental Excerpt of Record in Nos. 08-17094 and 08-17115, filed in the Ninth Circuit Court of Appeals [SER] 23, ¶ 2.)

"In addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration

of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(2). Included in the § 1973gg-7(b) criteria, the NVRA provides that a mail voter registration form "may require . . . identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (Pet. App. 26h). Section 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. (*Id.*)

B. The Passage and Implementation of Proposition 200.

Arizona voters passed Proposition 200 in 2004. One of Proposition 200's provisions required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). (Pet. App. 49h-50h.)

Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. (*Id.*) For example, an Arizona driver's license or nonoperating identification number issued after October 1, 1996, may be used. Approximately ninety percent of voting age Arizonans have driver's licenses. (Appellant Gonzalez Excerpts of Record in the Ninth Circuit Court of Appeals [Gonzalez ER] Tab 3 at 9.) Similarly, naturalized citizens have certificates of naturalization, and they need only provide an identification number from that certificate on the form in order to register. (*Id.* at 4.) If a person has none of these numbers to provide, he or she can

provide copies of other documents such as birth certificates, passports, naturalization documents, or "other documents that are meant as proof that [may be] established pursuant to" federal immigration law. (Pet. App. 9d (quoting A.R.S. § 16-166(F)(5)).)

Following approval of the measure by Arizona voters, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. (SER 12-17.) Arizona specifically stated that the measure would "require applicants registering to vote to provide evidence of United States citizenship with the application." (*Id.*) The Department of Justice precleared the measure on January 24, 2005. (*Id.*)

Following the implementation of Proposition 200, Arizona has continued to accept both the Federal Form and Arizona's form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with whichever application form the applicant submits. (SER 23-24, ¶¶ 2-3, 7.) The Arizona Secretary of State makes the Federal Form available to anyone who requests it. (SER 23, ¶ 4.) In addition, that form is publicly available for downloading and printing on the EAC's website. (SER 23, ¶ 4.)

C. Procedural History.

After the voters passed Proposition 200, several Plaintiffs brought overlapping Complaints to prevent its implementation. (Pet. App. 7c.) The district court

consolidated the actions and, following briefing and an evidentiary hearing, denied preliminary relief. (Pet. App. 1f-3f.) A two-judge motions panel of the Ninth Circuit reversed the district court and granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006).

This Court granted the State's petition for certiorari and vacated the court of appeals' order. *Purcell v. Gonzalez,* 549 U.S. 1, 8 (2006). However, this Court noted the following important policy considerations:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 7 (internal citations, quotation marks, and brackets omitted). This Court also recognized the Plaintiffs' interest in exercising the right to vote. *Id.* The Court did not, however, express an opinion on the correct disposition of the ultimate issues. *Id.* at 8.

Justice Stevens noted two factual resolutions as key in resolving this case: (1) The scope of the disenfranchisement that the evidence requirements will produce, and (2) the prevalence and the character of the fraudulent practices that allegedly justify those requirements. *Id.* (Stevens, J., concurring).

Following a trial on the remaining claims, including Equal Protection, the district court granted judgment in favor of the State. (Pet. App. 8c-9c.) The district court found that the burdens on potential registrants were not excessive. (Gonzalez ER Tab 3 at 32.) Plaintiffs were able to produce only "one person . . . who is unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate[ ] that . . . persons rejected are in fact eligible to register to vote." (*Id.*) The district court also found that voter fraud was a significant problem. For example, in 2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commission they were not U.S. citizens. (*Id.* at 16) Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now ("ACORN") submitted "garbage" voter-registration forms and had misled noncitizens into registering to vote. (*Id.*; *see also* Appellees' Supplemental Excerpt of Record in No. 08-17094 filed in the Ninth Circuit Court of Appeals at 209-10.)

Following remand, a panel of the court of appeals affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the State from requiring

evidence of citizenship. (Pet. App. 16d-17d) (*Gonzalez v. Arizona I*). Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the district court granted the State's motion for summary judgment on the NVRA claim. (Pet. App. 3e.)

Plaintiffs appealed. (Pet. App. 9c.) A divided second panel of the Ninth Circuit Court of Appeals reversed the district court's summary judgment ruling on the NVRA claim and reversed *Gonzalez I*. (Pet. App. 1a-96a) (*Gonzalez v. Arizona II*). The State petitioned for rehearing en banc and the court granted rehearing. (Pet. App. 1b-6b.)

In another divided opinion, the en banc court concluded that the NVRA preempts Proposition 200 with regard to federal elections. (Pet. App. 1c-122c) (*Gonzalez v. Arizona III*). The majority reasoned that the Elections Clause "empowers both the federal and state governments to enact laws governing the mechanics of federal elections." (*Id.* at 13c.) The majority determined that because the Election Clause permits Congress to "'conscript state agencies to carry out' federal mandates," it "operates quite differently from the Supremacy Clause." (*Id.* at 14c-15c (quoting *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)).) The majority concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." (*Id.* at 16c (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).) Instead, the majority determined that the Election Clause "establishes its own balance" and that the "'presumption against preemption' and [the]

'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (*Id.*)

Applying its newly created preemption analysis, the court determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." (*Id.* at 20c.) The court concluded that because of the evidence-of-citizenship requirement, Arizona did not "'accept[ ] and us[e]' the Federal Form," and therefore Arizona's requirement was preempted "when applied to the Federal Form." (*Id.* at 31c, 43c.)

Chief Judge Kozinski concurred, but observed the following:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

(Pet. App. 89c.) Chief Judge Kozinski also noted that although this Court "has never articulated any doctrine

giving deference to the states under the Elections Clause," this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." (*Id.* at 91c.) He then concluded that only this Court "can adopt such a doctrine." (*Id.*) Chief Judge Kozinski stated, in effect, that although he joined the majority, he also believed that this case was appropriate for review.

Judges Rawlinson and Smith dissented from the majority's holding that the "application of Proposition 200's proof-of-citizenship provision to prospective voters using the [Federal Form] is precluded by the . . . NVRA." (Pet. App. 100c.) The dissent disagreed with the majority opinion's interpretation of the Elections Clause, finding that it was not supported by this Court's decisions. (Pet. App. 116c-121c.) According to the dissent, this Court's Elections Clause decisions "emphasize the respect that should be accorded the procedures implemented by states," clarify that "preemption extend[s] only as far as a conflict exists," and hold that "a conflict exists only if the [state and federal] regulations cannot co-exist." (*Id.* at 116c, 121c.) The dissent therefore concluded that "[b]ecause the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause." (*Id.* at 121c.)

The dissent articulated several reasons, supported by the NVRA itself, that there was no conflict. For

example, drawing on an analogy first articulated by Chief Judge Kozinski in an earlier opinion in this case (Pet. App. at 96a-97a), the dissent observed:

> [A]ccepting and using something does not mean that it is necessarily sufficient. For example, merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card.

(Pet. App. at 105c.)

The dissent further found that § 1973-7(b) expressly "permits states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" (*Id.* at 107c (quoting 42 U.S.C. § 1973gg-7(b)(1)).) This showed Congress's intent that state officials should be able to require evidence of citizenship. (*Id.*) The dissent concluded that Congress could not have intended that the States could not deviate from the Federal Form because the NVRA expressly allows the States to develop their own form as long as it complies with 42 U.S.C. § 1973gg-7(b). (*Id.* at 109c-110c.) Consequently, the dissent concluded that Arizona did not defy "the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form." (*Id.* at 106c.)

REASONS WHY THE PETITION SHOULD BE GRANTED

The Court should grant review because the court of appeals' newly created Elections Clause preemption analysis is contrary to this Court's precedent and conflicts with the Elections Clause analysis of other federal circuit courts. The Court should resolve the conflict among the circuit courts about the correct analysis to be used when analyzing challenges to state laws under the Elections Clause.

The court of appeals' use of the incorrect preemption analysis is important because it resulted in a hypertechnical interpretation of a single provision of the NVRA, while ignoring the NVRA's plain language and the NVRA's stated purpose. The court of appeals' interpretation of the NVRA is also inconsistent with the recognition of this Court and another federal court of appeals that the NVRA does not limit the information that the State may request in the registration process.

The court of appeals' heightened Elections Clause analysis and its interpretation of the NVRA disrupt the delicate balance necessary to maintain federalism principles and interfere with the States' ability to protect the integrity of their elections. Because both Arizona law requiring prospective voters to provide sufficient evidence of citizenship and the NVRA's requirement that States accept and use the Federal Form can be enforced without conflict, the NVRA does not preempt the Arizona law. Moreover, the Arizona

law does not interfere with Congress's objectives in enacting the NVRA because requiring evidence of citizenship imposes a minimal burden on a limited number of persons and furthers the federal government's and the States' broad interest in protecting election integrity. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199-200 (2008) (plurality opinion) (upholding state law requiring photo identification against a facial attack because the "State's interest in protecting election integrity" outweighed the burdens on a small number of voters).

This Court should accept review here to clarify that like this Court's Supremacy Clause preemption analysis, the Elections Clause preemption analysis must take into account federalism principles. (*See* Pet. App. 91c) (Kozinski, J., concurring) (observing that this case is suitable for addressing whether the Court defers to the compelling state interest in "avoiding fraudulent voting by large numbers of unqualified electors.")

I. The Court of Appeals' Holding that Traditional Preemption Doctrines Do Not Apply to Preemption Analysis Under the Elections Clause Is Contrary to This Court's Precedent and Conflicts with Other Federal Circuit Court Decisions.

A. This Court's Cases Apply State-Deferential Preemption Principles in the Elections Clause Context and in Other Contexts in Which the Federal Government Has Constitutional Authority.

The court of appeals concluded that the "presumption against preemption" and the "plain statement rule," which apply to preemption analysis under the Supremacy Clause, did not apply to preemption analysis under the Elections Clause because the States "have no reserved authority over the domain of federal elections." (Pet. App. at 16c.) But this conclusion is contrary to this Court's Elections Clause precedent and ignores the fact that the Elections Clause expressly gives the States authority to act. And the court of appeals' reasoning is inconsistent with the Court's application of state-deferential preemption principles even in areas in which Congress has broad constitutional authority.

Since this country's founding, States have administered federal elections. The Elections Clause "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 511 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208,

217 (1986)). Accordingly, States have express authority to promulgate election codes, to regulate registrations, to prevent election fraud, and to supervise voting. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also Purcell*, 549 U.S. at 4 (explaining that States enact comprehensive election codes that apply to both state and federal elections for the purpose of ensuring the "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of our participatory democracy"); *United States v. Classic*, 313 U.S. 299, 311, 315 (1941) (stating that "the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of the representative in Congress" and that this discretion is limited only to the extent that Congress has "restricted state action by the exercise of its powers to regulate elections under [the Elections Clause].").

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Because of the States' constitutional role in the regulation of elections for federal office, this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause.

Consistent with the presumption against preemption, the Court has held that an Election Clause challenge fails where the congressional act at issue "does not expressly pre-empt state legislation," thus leaving the State free to enforce its law. *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93, 186 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). Similarly, to the extent that Congress does legislate pursuant to the Elections Clause, a conflict extends "only so far as the two [provisions] are inconsistent and no farther." *Ex Parte Siebold*, 100 U.S. 371, 386 (1879); *see also Smiley v. Holm*, 285 U.S. 355, 369-72 (1932) (evaluating state procedures for enacting congressional districts to determine if there was a conflict with the Elections Clause or federal statute and concluding that no conflict existed). The Ninth Circuit's decision in this case, which makes no finding of express preemption and does not find a conflict between the NVRA and Proposition 200, is directly contrary to these two holdings by this Court.

The court of appeals relied on *Siebold* and *Foster v. Love*, 522 U.S. 67 (1997), to conclude that no presumption against preemption applies under the Elections Clause. (Pet. App. 17c-20c.) But neither of those cases supports the court of appeals' conclusion that the Court disregarded state-deferential preemption principles or warrants striking down a state law that does not conflict with any federal statute and that expressly furthers a federal objective (that is, ensuring

the registration of eligible voters). The Ninth Circuit's decision is therefore without supporting authority.

In *Siebold*, the petitioners challenged their prosecution for violations of a federal statute that criminalized conduct in federal elections. 100 U.S. at 378-82. The petitioners argued that if Congress chose to regulate congressional elections, it must do so comprehensively rather than partially. *Id.* at 382-83. The Court rejected this proposition, concluding that Congress may alter the law respecting state practices "either wholly or partially" under the Elections Clause. *Id.* at 383. Although "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them," *id.* at 383-84, the conflict extends only "so far as the two are inconsistent, and no farther," *id.* at 386. A conflict arises "if both cannot be performed." *Id.* The Court explained that it was "bound to presume that Congress has [legislated] in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." *Id.* at 393. *Siebold*'s conclusion "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395; *cf. Roudebush*, 405 U.S. at 25-26 (holding that state election procedure "usurp[s]" federal law regarding qualification of members "only if it frustrates" Congress's "ability to make an independent final judgment" on qualifications).

The analysis in *Foster* is consistent with the analysis in *Siebold*. At issue in *Foster* was the validity of the Louisiana open primary statute that could determine who would fill the offices of U.S. Senator and Representative a month before the election date set by federal statute, 2 U.S.C. § 7. *Foster*, 522 U.S. at 68-69. The Court found that the state law was invalid because there was an irreconcilable conflict between the federal statute and the state law:

> Without paring the term "election" in § 7 down to the definition bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act or law in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 72. This Court noted that it was issuing a very narrow opinion that would not unduly interfere with state election procedures: "This case thus does not present the question whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4.

In contrast to the Court's broad definition of "election" in *Foster* that avoided creating an unforeseen conflict with state law, the court of appeals here construed the phrase "'accept and use' the federal form" narrowly or hypertechnically. (*See* Pet. App. 89c) (Kozinski, J., concurring) (stating that construing the

phrase "'accept and use' the federal form" to mean that the State "must employ the form as a complete registration package" would construe the phrase "narrowly or exclusively," whereas giving the phrase "a broad or inclusive construction," would allow States to "'accept and use' the federal form while also requiring registrants to provide documentation confirming what's in the form.") As will be discussed in Section I(B) *infra*, the court of appeals' interpretation of *Foster* is contrary to the Fifth Circuit Court of Appeals' interpretation of *Foster* in *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000), and is at the least inconsistent with another Ninth Circuit panel's interpretation of *Foster* in *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001).

In addition to the decisions in *Siebold* and *Foster*, the Court's use of state-deferential preemption principles even in areas in which Congress possesses broad constitutional powers, such as immigration, indicates that the Court would not abandon those principles when analyzing state statutes under the Elections Clause.

In *Arizona v. United States*, No. 11-182, 2012 WL 2368661, at *4 (U.S. June 25, 2012), the Court addressed whether federal law preempted four provisions of Arizona law that concerned illegal aliens within Arizona's borders. At the outset, the Court noted the federal government's "broad, undoubted power over the subject of immigration and the status of aliens." *Id.* at *5 (citing U.S. Const. art. I, § 8, cl. 4 and *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). But the

Court noted that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States" and examined the four provisions of Arizona law under traditional preemption principles. *Id.* at *7-8. The Court noted that federal law preempts state law where there is an express preemption provision, where Congress has indicated "its intent to displace state law altogether, and where state law conflicts with federal law." *Id.* And the Court instructed that "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* at *8 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Applying the traditional preemption principles, the Court found that federal law preempted one provision of Arizona law because Congress intended to preclude all state regulation on the subject of alien registration, *id.* at *10, and two other provisions because they were inconsistent with federal policy and objectives, *id.* at *12, *14. But the Court held that it was improper to enjoin enforcement of one Arizona provision "without some showing that enforcement of the provision *in fact* conflicts with federal immigration law and its objectives." *Id.* at *18 (emphasis added).

If the court of appeals had applied traditional preemption principles in the present case, it would have found that Proposition 200's evidence-of-citizenship requirement was consistent with the

language and purpose of the NVRA as well as other federal laws. *See* Section II *infra*; *see also* (Pet. App. 90c) (Kozinski, J., concurring) (noting that there would be "ample justification" for adopting "the Clear Statement Rule or the Presumption Against Preemption" for Election Clause Preemption given the States' vital interest in making sure that qualified electors choose their federal representatives).

B. The Circuit Courts of Appeals Are Split Concerning the Appropriate Preemption Analysis for Challenges to State Laws Under the Elections Clause.

In finding that the "presumption against preemption" and the "plain statement rule" are not transferable to the Elections Clause context, the court of appeals relied on *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008). But *Harkless* is not a preemption case and other circuit court decisions apply traditional preemption principles to Elections Clause challenges.

In *Bomer*, 199 F.3d at 774, the Fifth Circuit addressed whether federal election statutes that require that the election of members of Congress and presidential electors occur on federal election day preempted provisions of the Texas Election Code that permitted unrestricted early voting in federal elections. The court relied on *Foster*, 522 U.S. at 68, and *Classic*, 313 U.S. at 311, to determine the governing preemption analysis: "Thus, a state's discretion and flexibility in establishing the time, place and manner

of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the same subject." *Bomer*, 199 F.3d at 775 (emphasis added); *see also McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985) (holding in the context of a different Elections Clause issue that "[a] federal law preempts state law only when the two inevitably *conflict* or the law contains an *explicit* preemption clause") (emphasis added) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), which the Court decided under the Supremacy Clause).

The *Bomer* court relied on this Court's definition of "election" in *Foster* to conclude that the state statutes allowing early voting did not contravene federal election statutes "because the final selection [was] not made before the federal election day." 199 F.3d at 776. The court reasoned that its "conclusion [was] consistent with the Supreme Court's refusal to give a hyper-technical meaning to 'election' and its refusal to '[pare] the term "election" in § 7 to the definitional bone.'" *Id.* (quoting *Foster*, 522 U.S. at 72).

In *Keisling*, 259 F.3d at 1176, the Ninth Circuit upheld an Oregon statute that allowed early voting by mail. Although the court noted that the text and history of the federal election day statutes seemed to imply that multiday elections were not permitted, it concluded that "[t]he *Foster* definition of 'election' implie[d] that there [was] only a single election day in

Oregon, when the election [was] 'consummated,' even though there [were] prior voting days." *Id.* at 1175.

The Fifth Circuit in *Bomer* and the Seventh Circuit in *McIntyre* determined that an actual conflict must exist for a federal law to preempt a state law under the Elections Clause. In contrast to the conflict preemption analysis that the *Bomer* and *McIntyre* courts applied, the court of appeals here applied a newly created test that did not require an actual contradiction between the federal law and the state law. (Pet. App. 20c.) As shown above, the Court's reliance on *Foster* for its new theory is incorrect.

The court of appeals' analysis is also inconsistent with the analysis in *Bomer* and *Keisling*. Those courts recognized that this Court had defined "election" broadly to accommodate state election procedures and upheld state election laws that could have been interpreted to conflict with federal law. In contrast to *Bomer* and *Keisling*, the court of appeals here narrowly defined "accept and use the Federal Form" to invalidate Arizona's evidence-of-citizenship requirement even though it does not directly conflict with the NVRA and it is consistent with the NVRA's overall statutory scheme and purposes.

While the Sixth Circuit determined that the plain statement rule did not apply to the NVRA in *Harkless*, 545 F.3d at 454-55, the case addressed whether the Ohio Secretary of State could be sued for

failure to comply with the NVRA and not whether the NVRA preempted state law.[1] *Harkless* provides no support for the court of appeals' newly created preemption test.

The Court should grant review to resolve the conflicts among circuits and between the Ninth Circuit and this Court and to clarify that traditional preemption principles apply to challenges to state law under the Elections Clause.

II. The NVRA Does Not Preempt Proposition 200 as to the Federal Form or Otherwise.

If the court of appeals had applied traditional preemption principles, it would have found that Proposition 200's evidence-of-citizenship requirement was valid. (*See* Pet. App. 90c) (Kozinski, J., concurring) (noting that traditional rules of preemption would be useful to resolve case); (*see also id.* at 31c) (majority opinion) (applying court's own Elections

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[1] In contrast to the Sixth Circuit Court of Appeals in *Harkless*, the Eighth Circuit Court of Appeals recognized that the plain statement rule is likely to be appropriate under the Elections Clause in *United States v. Missouri*, 535 F.3d 844, 850 n.2 (8th Cir. 2008). Although ultimately avoiding the issue, the Eighth Circuit explained that while the Elections Clause does not speak in terms of reserved powers, that is really only a logical extension of the fact that federal elections post-date the federal government. *Id.* Accordingly, there is no functional difference between Elections Clause regulation and other federal impositions upon the States. *Id.*

Clause analysis).[2] Conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 2012 WL 2368661 *8 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and *Hines v. Davidowitz*, 312 U.S. 52 (1941), respectively). This Court "assume[s] that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). Under these principles, the court of appeals should have found that Proposition 200 was valid.

A. Proposition 200 Does Not Conflict with the NVRA.

"Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 573. Nothing in the court of appeals' opinion suggests that it is impossible for persons who register to vote to use the Federal Form and provide sufficient evidence of citizenship. After trial on other counts, the district court found that there was no excessive burden on persons seeking to register. (Gonzalez ER Tab 3 at 33.) The court of

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[2] The court of appeals did not find that Congress had expressly preempted Proposition 200 or that Congress had occupied the field concerning voter registration. There would be no basis for such a finding because the NVRA expressly requires state involve-ment in the registration process. *See, e.g.*, 42 U.S.C. § 1973gg-2(a)(3)(B) (Pet. App. 3h.)

appeals acknowledged as much, dispatching Arizona's argument regarding the NVRA's burden on the basis of interference with the NVRA, rather than on the basis of impossibility. (Pet. App. 30c-31c.)

Congress enacted the NVRA to achieve four goals:

> 1) To establish procedures that will increase the number of *eligible* citizens who register to vote in elections for Federal office;
>
> 2) To make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> 3) To protect the *integrity of the electoral process*; and
>
> 4) To ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b) (emphasis added) (Pet. App. 2h.) While the NVRA's goals indicate Congress's intent to increase voter registration, they also emphasize Congress's concern with the integrity of the electoral process, including ensuring that only eligible voters are registered. Because only U.S. citizens are eligible to vote, Proposition 200's evidence-of-citizenship requirement is consistent with the NVRA's express goals.

The court of appeals did not consider whether Proposition 200 was an obstacle to Congress's

purposes and objectives in enacting the NVRA because it rejected preemption principles. (*See* Pet. App. 16c.) Had the court addressed Congress's express purposes for enacting the NVRA and its objectives in light of the entire statutory scheme, it would have concluded that Congress did not intend the NVRA to bar States from properly assessing whether an applicant who registers to vote is eligible to vote. Rather, the opposite is true.

The NVRA builds upon the States' role in administering federal elections by providing certain requirements (and barring others, such as notarization) while "still leav[ing] room for policy choice" including what information to require from applicants. *Young v. Fordice*, 520 U.S. 273, 286 (1997) ("The NVRA does not list . . . all the other information the State may – or may not – provide or request.").

The Sixth Circuit's decision in *McKay v. Thompson* is illustrative and conflicts, at least in principle, with the Ninth Circuit's approach here. 226 F.3d 752, 755-56 (6th Cir. 2000). In that case, a plaintiff challenged a state requirement that people provide their social security numbers when registering to vote, claiming that this requirement violated the NVRA. *Id.* The requirement of a social security number is not authorized expressly by the NVRA. As with Arizona's requirements, the NVRA neither expressly authorizes nor expressly forbids the additional information being required of the applicant. Therefore, the Sixth Circuit concluded that the NVRA did not preclude the use of the numbers. *Id.* Indeed, as Judge Rawlison explained,

"the NVRA itself . . . expressly authorizes a state . . . to require additional information outside of the Federal Form for voter registration." (Pet. App. 102c) (Rawlinson, J., dissenting). The majority attempted to distinguish *McKay* by suggesting that because the United States Election Assistance Commission accepted the state requirement on the Federal Form, there was no conflict with that decision. (Pet. App. 34c.) That misses the point. The NVRA itself nowhere authorizes the use of social security numbers, and the Sixth Circuit expressly based its decision on the lack of a prohibition in the *statute*: "The NVRA does not specifically forbid use of social security numbers." 226 F.3d at 755-56. Similarly, in this case, the NVRA does not "specifically forbid" a request for evidence of citizenship. Therefore, under the Sixth Circuit rule, Arizona is not prevented by the NVRA from requesting evidence of citizenship.

Nor could the conclusion that Proposition 200 presents an obstacle to the NVRA be squared with this Court's decision in *Crawford*. In *Crawford*, the Court explained that certain burdens may arise where a photo identification is required in order to vote, such as the loss of the identification, but "[b]urdens of that sort, arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question" about the Indiana law requiring voters to provide photo identification. *Id.* at 197. Even if the burden may be "somewhat heavier . . . on a limited number of persons" this is not sufficient to sustain a "broad attack" on a state statute. *Id.* at 199-200.

Indeed, the NVRA itself does not suggest that Proposition 200 is an obstacle. The NVRA does not mandate the exclusive use of the Federal Form, but expressly authorizes States to develop and use their own form if the form meets the criteria in § 1973gg-7(b). 42 U.S.C. § 1973gg-4(a)(2) (Pet. App. 8h.) The state form "may require . . . indentifying information . . . as is necessary to enable the appropriate State election official to *assess the eligibility* of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added) (Pet. App. 26h.) Citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2) (Pet. App. 26h.) Therefore, the state form may require evidence of citizenship. If Congress had intended to preclude States from requiring evidence of citizenship, it would not have allowed States to develop and use their own form that requires such evidence. *Cf.* 42 U.S.C. § 1973gg-7(b)(3) (barring the States from requiring notarization) (Pet. App. 26h.) Instead, reading the NVRA provisions as a whole, it is logical to conclude that Congress intended that the Federal Form would set the minimum requirements and would allow a State to impose additional requirements, such as evidence of citizenship, that enable it to assess the applicant's eligibility to vote. *See Samanter v. Yosuf*, ___ U.S. ___, 130 S. Ct. 2278, 2289 (2010) (stating that the Court does not "'construe statutory phrases in isolation; [it] read[s] statutes as a whole'") (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)); *see also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986) ("Where possible, provisions of a statute should be read so as not to create a conflict.").

Congress's concern that only *eligible* voters register is evidenced throughout the NVRA. For example, the NVRA requires administrators of federal elections to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added) (Pet. App. 15h.) It also requires election administrators to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. 42 U.S.C. § 1973gg-6(a)(4) (Pet. App. 16h.) "Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place." *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) (explaining that the NVRA "protects only 'eligible' voters from unauthorized removal"). "[E]ligibility is the definitive criterion for registration and list maintenance obligations" and as a result, "States must strive to add eligible voters to their lists and to remove ineligible ones." *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010) (rejecting argument that the NVRA precluded a State from sending an address confirmation to a mail-in voter registrant). These NVRA provisions confirm that Congress wanted the States to register eligible voters and that Proposition 200 does not stand as an obstacle to the accomplishment and execution of Congress's purposes in enacting the NVRA.

Without the Arizona provision that was stricken by the Ninth Circuit, Arizona is forced to accept what

amounts to an honors system as to whether applicants are citizens or not. Although the applicant is required to sign a statement under oath that he is a citizen, someone willing to commit voter fraud will be willing to sign that statement. Only by requiring evidence of citizenship can the State screen out noncitizens who are attempting to vote. This is consistent with the purposes of the NVRA and is nowhere prohibited in the NVRA.

B. Because There Are Two Possible Interpretations of the Term "Accept and Use the Federal Form," the Court of Appeals Erred in Choosing the Interpretation that Is Contrary to the Plain Statement Rule and the Presumption Against Preemption.

The history of this case demonstrates that multiple federal judges have interpreted the phrase "accept and use the Federal Form" to allow States to require additional information to enable them to assess an applicant's eligibility. (Pet. App. 122c, 16d-17d, 3e; *cf. id.* at 97a-99a.) If the court of appeals had applied the plain statement rule or the presumption against preemption, it would have adopted an interpretation of the NVRA that avoided invalidating Proposition 200. *See Medtronic*, 518 U.S. at 485 ("In all preemption cases . . . [this Court] start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.") (internal

citations and quotation marks omitted); *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976) (stating that even in areas where Congress possesses broad authority, such as immigration, the Court will not presume that Congress intended to "preclude even harmonious regulation touching on aliens in general, or the employment of illegal aliens in particular"). The court of appeals erred in adopting an interpretation of the NVRA that ignores the plain statement rule and the presumption against preemption.

CONCLUSION

For the forgoing reasons, the State requests that the Court grant the Petition for Writ of Certiorari.

DATED: July 16, 2012

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ,; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; JAN BREWER, in her official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder;

CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

YES ON PROPOSITION 200,

Defendant-intervenor-Appellee,

No. 08-17094
D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; JAN BREWER, in her official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; Patty Hansen, Coconino County Election Director; KELLY DASTRUP, Navajo County

Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

YES ON PROPOSITION 200,

Defendant-intervenor-Appellee,

No. 08-17115
D.C. No.
2:06-cv-01268-ROS
OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
October 20, 2009 – Tucson, Arizona

Filed October 26, 2010

Before: Sandra Day O'Connor, Associate Justice,*
Alex Kozinski, Chief Judge, and Sandra S. Ikuta,
Circuit Judge.

Opinion by Judge Ikuta;
Dissent by Chief Judge Kozinski

COUNSEL

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Barbara A. Bailey, Assistant Attorney General, Phoenix, Arizona, for Defendants/Appellees State of Arizona and Arizona Secretary of State Ken Bennett.

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

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OPINION

IKUTA, Circuit Judge:

Proposition 200 requires prospective voters in Arizona to present documentary proof of citizenship in order to register to vote, Ariz. Rev. Stat. §§ 16-152, 16-166, and requires registered voters to present proof of identification in order to cast a ballot at the polls, Ariz. Rev. Stat. § 16-579. This appeal raises the questions whether Proposition 200 violates the Voting Rights Act § 2, 42 U.S.C. § 1973, is unconstitutional under the Fourteenth or Twenty-fourth Amendments of the Constitution, or is void as inconsistent with the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg *et seq.* We hold that the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documentary proof of citizenship requirement for registration is therefore invalid. We reject the remainder of Appellants' arguments.

I

On November 2, 2004, Arizona voters passed a state initiative, Proposition 200, which (upon proclamation of the Governor) enacted various revisions to the state's election laws. Among other changes, Proposition 200 amended the procedures for voter registration and for checking voters' identification at polling places in both state and federal elections. With respect to voter registration procedures, Proposition 200 amended two state statutes. First, it added the following requirement to section 16-152 of the Arizona Revised Statutes, which lists the contents of the state voter registration form:

> The form used for the registration of electors shall contain . . . [a] statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached.

Ariz. Rev. Stat. § 16-152(A)(23). Second, it amended section 16-166 of the Arizona Revised Statutes to state that: "The County Recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," and defined satisfactory evidence of citizenship to include a driver's license or similar identification license issued by a motor vehicle agency, a birth certificate, passport, naturalization documents or other specified immigration documents, or specified cards

relating to Native American tribal status. *See* Ariz. Rev. Stat. § 16-166(F).[1]

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[1] Section 16-166(F) provides the following list of approved identification documents:

> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
>
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
>
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
>
> 5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
>
> 6. The applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Proposition 200 also addressed identification procedures at polling places. Specifically, Proposition 200 amended section 16-579 of the Arizona Revised Statutes to provide that voters "shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector." Ariz. Rev. Stat. § 16-579(A) (2004). The Secretary of State, acting under statutory authority, *see* Ariz. Rev. Stat. § 16-452(A), (B), promulgated a procedure specifying the "forms of identification" accepted under the statute, which included photograph-bearing documents such as driver's licenses and non-photograph-bearing documents such as utility bills or bank statements. In 2009, the state legislature amended section 16-579 to codify that procedure.[2]

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[2] As of 2009, section 16-579(A)(1) provides:

> (a) A valid form of identification that bears the photograph, name and address of the elector that reasonably appears to be the same as the name and address of the precinct register, including an Arizona driver license, an Arizona nonoperating identification license, a tribal enrollment card or other form of tribal identification or a United States federal, state or local government issued identification. Identification is deemed valid unless it can be determined on its face that it has expired.
>
> (b) Two different items that contain the name and address of the elector that reasonably appears to be the same as the name and address in the precinct register, including a utility bill, a bank or credit union

(Continued on following page)

Shortly after Proposition 200's passage, various plaintiffs filed a complaint against Arizona to prevent the implementation of these changes. Two groups of plaintiffs are relevant to this appeal. Jesus Gonzalez, representing individual Arizona residents and organizational plaintiffs, claimed that Proposition 200 violated the NVRA (to the extent the Arizona enactment regulated federal registration procedures), was a poll tax under the Twenty-fourth Amendment, burdened naturalized citizens in violation of the Equal Protection Clause of the Fourteenth Amendment, and disparately impacted Latino voters and diluted Latino voting power in violation of § 2 of the Voting Rights Act. The Inter Tribal Council of Arizona (ITCA), a non-profit organization representing twenty

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statement that is dated within ninety days of the date of the election, a valid Arizona vehicle registration, an Arizona vehicle insurance card, Indian census card, tribal enrollment card or other form of tribal identification, a property tax statement, a recorder's certificate, a voter registration card, a valid United States federal, state or local government issued identification or any mailing that is "official election material." Identification is deemed valid unless it can be determined on its face that it has expired.

(c) A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register or the identification is a valid United States Military identification card or a valid United States passport and does not bear an address, the identification must be accompanied by one of the items listed in subdivision (b) of this paragraph.

Arizona tribes, filed a complaint along with various other organizations,[3] the Hopi Tribe, and Representative Steve Gallardo from the Arizona State House of Representatives.[4] Like Gonzalez, ITCA claimed that Proposition 200 violated the NVRA (to the extent it regulated federal registration procedures), and constituted a poll tax under the Twenty-fourth Amendment. ITCA also separately claimed that Proposition 200 was a poll tax under the Fourteenth Amendment. The district court consolidated Gonzalez and ITCA's complaints.

Gonzalez and ITCA moved for a preliminary injunction to enjoin application of Proposition 200's requirements in the 2006 general election, *Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1047 (9th Cir. 2007). The district court denied their motion, but a motions panel of this court reversed and granted the injunction pending disposition of the merits on appeal. *Id.* The Supreme Court vacated the injunction,

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[3] ITCA's action was joined by the League of Women Voters of Arizona, the League of United Latin American Citizens, the Arizona Advocacy Network, and People For the American Way Foundation, as well as the claimants listed above.

[4] We refer to named plaintiffs Gonzalez and ITCA as representing all plaintiffs associated in their respective actions. Where appropriate, we refer to Gonzalez and ITCA individually; however, because Gonzalez and ITCA bring the same NVRA and Twenty-fourth Amendment claims, we refer to both collectively as "Gonzalez" in the sections discussing these two claims. We refer to the defendants collectively as "Arizona," even though Arizona county recorders were also named as defendants in these consolidated actions.

and remanded for clarification whether this court had given due deference to the district court's findings of fact. *Id.* at 1048; *see Purcell v. Gonzalez,* 549 U.S. 1, 5 (2006). On remand, Gonzalez and ITCA chose to pursue injunctive relief with respect only to Proposition 200's registration requirement. *Gonzalez I,* 485 F.3d at 1048. The *Gonzalez I* panel thereafter affirmed the district court's denial of the preliminary injunction, holding that Proposition 200's registration requirement was not a poll tax, *id.* at 1049, and was not a violation of the NVRA, *id.* at 1050-51. The district court subsequently granted Arizona's motion for summary judgment, relying on *Gonzalez I* to rule that Proposition 200 was not an unconstitutional poll tax and was not invalid as conflicting with the NVRA. After trial, the district court resolved all other claims in favor of Arizona, holding that Proposition 200 did not violate § 2 of the Voting Rights Act and did not discriminate against naturalized citizens or burden the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.

On appeal, Gonzalez and ITCA challenge the district court's rulings on the NVRA and the Twenty-fourth Amendment. In addition, ITCA claims that Proposition 200 is an invalid poll tax under the Fourteenth Amendment, and Gonzalez challenges the district court's decisions on both the Voting Rights Act claim and the equal protection challenge for discrimination based on national origin and undue burden on the fundamental right to vote. We consider each of these claims in turn.

II

We begin with Gonzalez's claim that Proposition 200's documentary proof of citizenship requirement for registration is superseded by the NVRA's comprehensive procedure for registering voters in federal elections. Gonzalez argues that the NVRA preempts Arizona law under both the Supremacy Clause and the Elections Clause of the U.S. Constitution. In response, Arizona relies on the Supremacy Clause's "presumption against preemption," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), to argue that the NVRA did not expressly or impliedly preempt state voter registration laws. Before addressing the parties' arguments, we first consider whether the framework of the Elections Clause or the Supremacy Clause guides our analysis here.

A

The Elections Clause establishes a unique relationship between the state and federal governments. It provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. In a nutshell, the Elections Clause gives state governments initial responsibility to regulate the mechanics of national elections,

"but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997).

The history of the Elections Clause reveals the reasoning behind this unusual delegation of power. Under the Articles of Confederation, the states had full authority to maintain, appoint, or recall congressional delegates.[5] At the Philadelphia Convention, delegates expressed concern that, if left unfettered, states could use this power to frustrate the creation of the national government, most obviously by neglecting to hold federal elections.[6] The Framers decided that Congress should be given the authority to oversee the states' procedures related to national elections as a safeguard against potential state abuse. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995); *see also* The Federalist No. 59 (Alexander Hamilton) (Ron P. Fairfield 1981 ed., 2d ed.) (explaining that "[n]othing can be more evident, than that an

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[5] *See* Articles of Confederation of 1781, art. V ("[D]elegates shall be annually appointed in such manner as the legislature of each state shall direct . . . with a power, reserved to each state, to recall its delegates. . . . Each state shall maintain its own delegates in a meeting of the states. . . .").

[6] *See* 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia & Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution 225 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1901) [hereinafter Elliot's Debates].

exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Over the protest of some Southern delegates,[7] the Framers approved language giving Congress power to "make or alter" the states' regulations. *See* 5 Elliot's Debates 401-02 (statement of James Madison). As subsequently modified to give Congress supervisory power, this language became the Elections Clause.[8]

As indicated by this historical context, the Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. By its plain language, the Clause delegates default authority to the states to prescribe the "Times, Places, and Manner" of conducting national elections in the first instance. U.S. Const. art. I,

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[7] South Carolinian delegates Charles Pinckney and John Rutledge moved to exclude the language giving Congress this supervisory power over the states. 5 Elliot's Debates at 401. "The states, they contended, could and must be relied on" to regulate legislative appointments. *Id. See also Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004).

[8] Alexander Hamilton described the need for congressional oversight of the states as follows: "[The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety." The Federalist No. 59.

§ 4, cl. 1. The states would not possess this authority but for the Clause: As the Supreme Court has noted, the authority to regulate national elections "aris[es] from the Constitution itself," and is therefore "not a reserved power of the States." *U.S. Term Limits*, 514 U.S. at 805. Because federal elections did not come into being until the federal government was formed, individual states have no inherent or preexisting authority over this domain. *See id.* at 804-05.

While the states have default responsibility over the mechanics of federal elections, because Congress "may at any time by Law make or alter such Regulations" passed by the state, U.S. Const. art. I, § 4, cl. 1, power over federal election procedures has been described by the Supreme Court as ultimately "committed to the exclusive control of Congress." *Colegrove v. Green*, 328 U.S. 549, 554 (1946).[9] Accordingly, "the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to

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[9] The Court has generally construed Congress's exclusive authority under the Elections Clause expansively. *See, e.g., United States v. Gradwell*, 243 U.S. 476, 483 (1917) (authority over federal election process, from registration to certification of results); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the right of an eligible voter to cast ballot and have ballot counted); *Ex Parte Coy*, 127 U.S. 731, 752-53 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis Congressional elections).

exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold,* 100 U.S. 371, 384 (1879); *see also Foster,* 522 U.S. at 69.

Not only does the Elections Clause grant Congress authority to supersede state election laws, but we have interpreted the Clause to require states to affirmatively implement Congress's superseding regulations, without compensation from the federal government. *Voting Rights Coalition v. Wilson,* 60 F.3d 1411, 1415 (9th Cir. 1995). Put another way, the Elections Clause gives Congress the power to "conscript state agencies to carry out [federal] voter" procedures in accordance with Congress's own mandates. *Id.* This makes the Clause unique among virtually all other provisions in the Constitution, which "mostly tell [states] not what they must do but what they can or cannot do." *ACORN v. Edgar,* 56 F.3d 791, 794 (7th Cir. 1995).

In sum, a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress acts, the states are obligated to conform to and carry out whatever procedures Congress requires. *See Foster,* 522 U.S. at 69.

As should be clear from this overview, the Elections Clause operates quite differently from the Supremacy Clause. The Supremacy Clause provides

that the law of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985).

In our system of dual sovereignty, when deciding under the Supremacy Clause whether a particular state law is preempted by a federal enactment, courts strive to maintain the "delicate balance" between the States and the Federal Government. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see Medtronic*, 518 U.S. at 485. Courts thus endeavor to preserve the states' authority when possible, *see Gregory*, 501 U.S. at 460, particularly where a congressional enactment threatens to preempt a state law regulating matters of its residents' health and safety, an area to which "[s]tates traditionally have had great latitude . . . to legislate" as a matter of local concern, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). *See also Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008); *Medtronic*, 518 U.S. at 485. Only where no reconciliation between state and federal enactments may be reached do courts hold that Congress's enactments must prevail, *e.g.*, *Altria*, 129 S. Ct. at 543, with the understanding, however, that "the individual States . . . retain [their] independent

and uncontrollable authority . . . to any extent" that Congress has not interfered, *see* The Federalist No. 33 (Alexander Hamilton).

In light of the different history and purpose of these constitutional provisions, it is not surprising that the preemption analysis for the Supremacy Clause differs from that of the Elections Clause. In its Supremacy Clause jurisprudence, the Supreme Court has crafted special guidelines to assist courts in striking the correct balance between federal and state power. First, in examining claims that a federal law preempts a state statute through the Supremacy Clause, the Supreme Court instructs courts to begin with a "presumption against preemption." *E.g., Altria Group,* 129 S. Ct. at 543; *Medtronic,* 518 U.S. at 485. This principle applies because, as the Court has recently noted, "respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotation marks omitted). Second, the Court has adopted a "plain statement rule," holding that a federal statute preempts a state statute only when it is the "clear and manifest purpose of Congress" to do so. *Gregory,* 501 U.S. at 461 (internal quotation marks omitted); *see also Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) ("Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act, unless that is the clear and manifest

purpose of Congress.") (internal quotation marks and brackets omitted)). Like the presumption against preemption, this rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

This jurisprudence, which is motivated in large part by federalism concerns, is unsuited to analyzing the preemptive effect of a congressional enactment under the Elections Clause. Because the states' sole power over national election procedures is that delegated by the Elections Clause, *U.S. Term Limits*, 514 U.S. at 805, and states otherwise have no reserved authority over this domain, *id.*, courts deciding issues raised under the Elections Clause need not strike any balance between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance, resolving all conflicts in favor of the federal government. *See, e.g.*, *Foster*, 522 U.S. at 71 (stating that "the Constitution explicitly gives Congress the final say" on matters related to federal election procedures). For this reason, the "presumption against preemption" and "plain statement rule" that guide courts' analysis of preemption under the Supremacy Clause are not transferable to the Elections Clause context. *Cf. Gregory*, 501 U.S. at 460-61. Indeed, the Supreme Court has suggested as much. In *Foster*, the Court upheld the Fifth Circuit's determination that a state election law was voided by a federal election law; however, instead of

adopting the Fifth Circuit's Supremacy Clause analysis, the Supreme Court analyzed the claim under the Elections Clause, without ever mentioning any presumption against preemption or requirement of a plain statement of congressional intent to preempt. *See Foster,* 522 U.S. 67; *Love v. Foster,* 90 F.3d 1026 (5th Cir. 1996), *cert. granted* in 522 U.S. 67 (1997). In fact, our survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles.

Because the Elections Clause empowered Congress to enact the NVRA, *Wilson,* 60 F.3d at 1414, the preemption analysis under that Clause is applicable here. We begin our analysis as the Court did in *Foster,* guided by Election Clause preemption principles. *Accord Harkless v. Brunner,* 545 F.3d 445, 454 (6th Cir. 2008) (declining to apply Supremacy Clause preemption principles in analyzing the preemptive effect of the NVRA).

B

The Supreme Court first explained the principles of Elections Clause preemption in *Siebold,* 100 U.S. 371. In that case, the Court likened the relationship between the laws passed by Congress and the state legislatures under the Elections Clause to "prior and subsequent enactments of the same legislature." *Id.* at 384. "The State laws which Congress sees no occasion to alter, but which it allows to stand, are in

effect adopted by Congress." *Id.* at 388. By this token, just as a subsequent legislature is not required to make an "entirely new set" of laws when modifying those of a prior legislature, neither is Congress required to wholly take over the regulation of federal election procedures when choosing to "make or alter" certain of the states' rules. *Id.* at 384. According to the Court, there is no "intrinsic difficulty in such cooperation" between the state and national legislatures because the two governments do not possess an "equality of jurisdiction" with respect to federal elections. *Id.* at 392. While Congress may override state enactments, the state may not vitiate an action of Congress by adopting a system of regulations to undo congressional efforts. *See id.* at 393, 397. In all instances, "the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." *Id.* at 397.

Over a century later, the Supreme Court clarified what constitutes a conflict under the Elections Clause's single system of federal election procedures. *See Foster*, 522 U.S. 67. *Foster* considered whether a congressional enactment superseded a Louisiana statute regulating the same federal election procedure. *Id.* at 68-69. Specifically, sections 1 and 7 of Title 7 of the U.S. Code established the date for federal congressional elections as the Tuesday after the first Monday in November. *Id.* at 69-70. A Louisiana statute established an open primary in October where state voters could elect the candidate who would fill the offices of United States Senator and

Representative. *Id.* at 70. Only if the open primary failed to result in a majority candidate would a run off election between the top two candidates be held on Congress's specified election day. *Id.* In response to a challenge by Louisiana voters, the Court unanimously held that the state and federal acts conflicted, and thus invalidated the Louisiana law. *Id.* at 74.

In concluding that Congress's power to preclude the state statute was beyond argument, the Court rejected the state's claim that its statute and the federal enactment could be construed harmoniously. *Id.* at 73. Louisiana asserted that "the open primary system concern[ed] only the 'manner' of electing federal officials, not the 'time' at which the elections will take place." *Id.* at 72. The Court discarded this "attempt to draw this time-manner line" as "merely wordplay" and an "imaginative characterization" of the statutes. *Id.* at 72-73. Building upon the principles from *Siebold,* the Court declined to adopt a strained interpretation of the statutes to reconcile a potential disagreement. *See id.* Rather, the Court emphasized Congress's unique plenary authority not only to supplant state rules but to conscript states to carry out federal enactments under the Elections Clause, and found it enough that, under a natural reading, the state and federal enactments addressed the same procedures and were in conflict. *Id.* (noting that the Louisiana's regulation addressed the timing of elections "quite as obviously" as the federal one). Refusing to "par[e] [the statute] down to the

definitional bone," the Court held that the state enactment was void. *Id.* at 72, 74.

Reading *Siebold* and *Foster* together, we derive the following approach for considering whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold,* we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold,* 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster,* 522 U.S. at 74. With this approach in mind, we consider whether the NVRA and Proposition 200 operate harmoniously in a single procedural scheme for federal voter registration.

C

To resolve the question here, we must first understand both the federal and state voter registration procedures at issue. We earlier explained the changes to Arizona's registration statutes under Proposition 200, which incorporated a requirement that registrants submit documentary proof of citizenship in order to register to vote. *See supra* Part I; Ariz. Rev.

Stat. §§ 16-152, 16-166. Our next step is to examine the scope of the NVRA.

1

Congress enacted the NVRA because, among other reasons, it determined that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a).

Initially, Congress attempted to address this problem by enacting legislation that permitted the government and prospective voters to challenge discriminatory practices in the courts. *See South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (discussing the Civil Rights Act of 1957, which "authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds," and the Civil Rights Act of 1964, which "expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics" used to disqualify African Americans from voting in federal elections).[10] The elimination of discriminatory voting practices through litigation, however, was "slow and

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[10] Neither of these Acts were passed under the substantive authority of the Elections Clause, and therefore the Elections Clause analysis is not applicable to cases considering these enactments.

expensive, and [meanwhile] the States were creative in contriving new rules to continue violating the Fifteenth [and Fourteenth] Amendment[s] in the face of adverse federal court decrees." *Nw. Austin. Mun. Utility Dis. No. One v. Holder* (*NAMUDNO*), 129 S. Ct. 2504, 2508-09 (2009) (internal quotation marks omitted). To limit voter registration, some local officials defied court edicts or "simply closed their registration offices to freeze the voting rolls." *Katzenbach*, 383 U.S. at 314. Congress's attempts to "authoriz[e] registration by federal officers . . . had little impact on local maladministration." *Id.* Nearly a century after the Civil War, registration of eligible African American voters in some states was still fifty percentage points lower than that of eligible white voters. *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

Congress tried a different approach to addressing this problem by passing the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973 *et seq.*). The VRA, enacted under the authority of Congress's Fifteenth Amendment enforcement powers, is "a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 308, 315. As enacted, the VRA suspended the use of literacy tests, § 4(a)-(d), required covered jurisdictions to pre-clear changes in voting procedures and practices, § 5, and provided for the appointment of federal examiners to assist in registering qualified citizens to vote, §§ 6, 7, 9, 13. Section 2 of the VRA also permits actions to be brought to void voting

qualifications or prerequisites "resulting in the denial or abridgement of the right of any citizen of the United States to vote on account or race or color."

While considered on the whole to be a successful tool in eliminating the more obvious discriminatory voting procedures, *see NAMUDNO,* 129 S.Ct. at 2511, the VRA failed to address voter registration procedures, which imposed a "complicated maze of local laws and procedures, in some cases as restrictive as the out-lawed practices, through which eligible citizens had to navigate in order to exercise their right to vote," H.R. Rep. No. 103-9, at 3 (1993). Between 1988 and 1993, Congress held a series of hearings focused on reforming the voter registration process to address the increasingly pressing issue of low voter turnout in federal elections. *Condon v. Reno,* 913 F. Supp. 946, 949 n.2 (D.S.C. 1995). Congress found that, while over eighty percent of registered citizens voted in Presidential elections, only sixty percent of eligible voters were registered. H.R. Rep. No. 103-9, at 3. Public opinion polls showed that the primary reason eligible citizens were not voting was the failure to register. *Id.* While acknowledging that this failure was attributable to many factors outside its control, Congress enacted the NVRA to address the problems within its control, namely those barriers to registration that were imposed by state governments. *See id.* Under the Elections Clause, Congress had the power "to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . registration." *Smiley v. Holm,* 285 U.S.

355, 366 (1932). Through this authority, Congress enacted the NVRA to remove these obstacles and "to provide simplified systems for registering to vote in federal elections." *Young v. Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted).

2

The NVRA is a comprehensive scheme enacting three significant changes to federal election registration procedures nationwide: (1) it creates a standard "Federal Form" (described below) for registering federal voters; (2) it requires states to establish procedures to register voters for federal elections according to three prescribed methods; and (3) it regulates maintenance of voting lists. *See* 42 U.S.C. § 1973gg *et seq.*

Section 1973gg, setting forth the act's "Findings and Purposes," provides an overview of the NVRA. The "findings" subsection, § 1973gg(a), articulates Congress's intent to promote voter registration and to address "discriminatory and unfair registration laws." The "purposes" subsection, § 1973gg(b), provides a preview of the operative sections of the NVRA, listing Congress's goals of increasing voter registration and enhancing the participation of eligible voters (relating to Sections 2 through 5, § 1973gg-2-§ 1973gg-5) and the goals of ensuring the accuracy of registration rolls and protecting the integrity of the electoral process (relating to Section 6, § 1973gg-6).

Section 2, § 1973gg-2, sets forth the scope and applicability of the act.[11] Each state (except for those that do not require voter registration as a prerequisite to voting) "shall establish procedures to register" voters for federal elections according to the NVRA's three methods "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law." § 1973gg-2(a).

The first method of voter registration is described in Section 3, § 1973gg-3. This section provides that any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). This provision earned the statute its informal title, the "Motor Voter Law." *United States v. Lara*, 181 F.3d 183, 191 (1st Cir. 1999). Under the statute, the voter registration form must be part of the driver's license application, and generally "may not require any information that duplicates information required in the driver's license portion of the form." § 1973gg-3(c)(2)(A). Section 3 also limits the content of the form to the minimum necessary to prevent

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[11] Section 1 of the NVRA defines terms used in the statute. § 1973gg-1.

duplicate voter registrations and to enable the state to assess the eligibility of the applicant.[12]

The second method of voter registration, set forth in Section 4, § 1973gg-4, requires states to register federal voters by mail using the Federal Form. Section 4(a)(1) states that "[e]ach State shall accept and use the [Federal Form] for the registration of voters in elections for Federal office." Section 4(a)(2) provides that, "[i]n addition to accepting and using [the Federal Form], a State may develop and use a mail voter registration form that meets all the criteria" of the Federal Form. Section 4(b) discusses the availability of the Federal Form and the state equivalent: States must make the mail registration form "available for distribution through governmental and private entities, with particular emphasis on making

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[12] Section 1973gg-3(c) provides, in pertinent part:

The combined motor vehicle-voter registration form:

(B) may require only the minimum amount of information necessary to –

(I) prevent duplicative voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that –

(I) states each eligibility requirement (including citizenship)

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant under penalty of perjury[.]

them available for organized voter registration programs." § 1973gg-4(b). With certain exceptions not pertinent here, the statute permits states to require citizens who register by mail to vote in person if they have not previously voted in the jurisdiction. § 1973gg-4(c).

The third method of federal voter registration is mandated by Section 5, § 1973gg-5, which requires states to designate certain state offices for voter registration. Targeting "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with" motor vehicle agencies, H.R. Rep. No. 103-55, at 19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144, this section requires states to provide for federal registration at "all offices in the State that provide public assistance," § 1973gg-5(a)(2)(A), and "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," § 1973gg-5(a)(2)(B). The state may also designate additional government offices such as "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and [other offices] that provides services to persons with disabilities" as voter registration agencies. § 1973gg-5(a)(3).

Section 5 requires each designated agency to provide applicants with the Federal Form, help them complete it, and mandates "[a]cceptance of completed voter registration application forms for transmittal to

the appropriate State election official." § 1973gg-5(a)(4)(A). As in Section 4, the designated state agency may also distribute a state form, but only "if it is equivalent" to the Federal Form. § 1973gg-5(a)(6)(A)(ii).

Section 6, § 1973gg-6, establishes procedures to enhance the accuracy and integrity of the official voting lists both by removing ineligible voters and preventing the mistaken removal of eligible voters.

Section 7, § 1973gg-7, describes how the federal and state governments will determine the contents of the Federal Form, and otherwise coordinate administration of the NVRA's procedures. This section delegates the creation of the Federal Form to the federal Election Assistance Commission (EAC).[13] § 1973gg-7(a). The section requires the EAC to work "in consultation with the chief election officers of the States" in crafting the Form's contents. *Id.*

Section 7 also sets out parameters for what the Federal Form may, shall, and cannot include.[14] Among

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[13] The responsibilities of the EAC were formerly held by the Federal Election Commission (FEC). When Congress passed the Help America Vote Act (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, in 2002, it created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA.

[14] The Federal Form:

> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the

(Continued on following page)

other things, the Federal Form "may require only such identifying information" as is necessary to allow the state to determine the eligibility of the applicant and to administer the voter registration and election process. § 1973gg-7(b)(1). The Federal Form must inform the applicant as to every eligibility requirement "including citizenship" and require the applicant to attest, under penalty of perjury, that the

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appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that –

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(I) [voter eligibility requirements and penalties for false applications, § 1973gg-6(a)(5)]

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does not register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

§ 1973gg-7(b).

applicant meets each requirement. § 1973gg-7(b)(2). The form "may not include any requirement for notarization or other formal authentication." § 1973gg-7(b)(3).

Section 8, § 1973gg-8, requires states to designate an officer to serve as chief election official. Section 9, § 1973gg-9, regulates civil enforcement of the NVRA's provisions and designates a private right of action under the statute. Section 10, § 1973gg-10, sets forth the criminal penalties for election fraud or other non-compliance with the statute.

As this overview indicates, the thrust of the NVRA is to increase federal voter registration by streamlining the registration process. In this vein, the NVRA requires states to make registration opportunities widely available, at the motor vehicle bureau, § 1973gg-3, by mail, § 1973gg-4, and at public assistance, disability service, and other designated state offices, § 1973gg-5. Along with increasing the opportunities for registration, the NVRA eases the burdens of completing registration forms. At the motor vehicle authority, for instance, voter registration must be included as part of the driver's license application and the combined form cannot require duplicative information. § 1973gg-3(c)(2)(A). The NVRA also regulates the Federal Form to meet its goal of eliminating obstacles to voter registration. *See* § 1973gg(b)(1)-(2). Thus, the NVRA forbids the EAC from including any identifying information beyond that "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter

registration and other parts of the election process." § 1973gg-7(b)(1). In sum, as every court to have considered the act has concluded, the NVRA's central purpose is to increase voter registration by streamlining voter registration procedures. *See, e.g., Harkless,* 545 F.3d at 449; *Welker v. Clarke,* 239 F.3d 596, 598-99 (3d Cir. 2001) ("One of the NVRA's central purposes was to dramatically expand opportunities for voter registration. . . ."); *Disabled in Action of Metro. N.Y. v. Hammons,* 202 F.3d 110, 114 (2d Cir. 2000); *Lara,* 181 F.3d at 192 ("The NVRA is addressed to heightening overall popular participation in federal elections. . . ."); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen,* 152 F.3d 283, 285 (4th Cir. 1998) ("Congress passed the NVRA . . . to encourage increased voter registration for elections involving federal offices" and "to make it easier to register to vote."); *ACORN v. Miller,* 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").

3

Turning now to our Elections Clause analysis, we consider whether Proposition 200's documentary proof of citizenship requirement is superseded by the NVRA. As indicated by the approach derived from *Siebold* and *Foster, see supra* Part II.B, we consider the state and federal enactments together as if they composed a single system of federal election

procedures. Next, we consider whether, read naturally, the NVRA provisions complement Proposition 200's voter registration requirements or supersede them. If a natural interpretation of the language of the two enactments leads to the conclusion that the state law does not function consistently and harmoniously with the overriding federal scheme, then it is replaced by the federal statute.

Applying this framework, we conclude that Proposition 200's documentary proof of citizenship requirement conflicts with the NVRA's text, structure, and purpose. First, the NVRA addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections. *See Foster*, 522 U.S. at 73. Section 7 of the NVRA, § 1973gg-7, both spells out the information that an applicant must provide in order to register to vote in a federal election and limits what the Federal Form can require. It "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." § 1973gg-7(b)(1). The Federal Form accounts for eligibility concerns by requiring applicants to attest, under penalty of perjury, that they meet every eligibility requirement. § 1973gg-7(b)(2). Acknowledging the states' interests in ensuring voter eligibility, Congress allowed states to give their input on the contents of the

Federal Form in an advisory capacity to the EAC. § 1973gg-7(a)(2). Given the NVRA's comprehensive regulation of the development of the Federal Form, there is no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration for registrants using that form. If viewed as a second enactment by the same legislature, the NVRA clearly subsumes Proposition 200's additional documentary requirement on registrants using the Federal Form. *See Siebold*, 100 U.S. at 384.

Further supporting this conclusion, the value of the Federal Form (and hence a centerpiece of the NVRA) would be lost, and Congress's goal to eliminate states' discriminatory or onerous registration requirements vitiated, if we were to agree with Arizona that states could add any requirements they saw fit to registration for federal elections through the Federal Form. For instance, the NVRA prohibits the Federal Form from requiring notarization or other such formal authentication. § 1973gg-7(b)(3). If the NVRA did not supersede additional state requirements on registrants using the Federal Form, as Arizona asserts, then states would be free to impose a notarization requirement as a prerequisite to their "accept[ance] and use" of the form, *see* § 1973gg-4(a)(1), even though such a requirement would directly contradict Congress's intent in prohibiting such a requirement in the form itself.

Moreover, specific statutory language in the NVRA, when read in an unstrained and natural

manner, is inconsistent with the state enactment. The NVRA mandates that states "shall accept and use" the Federal Form when applicants register by mail. § 1973gg-4(a). It likewise requires "acceptance" of the completed Federal Form at state office buildings, which must be transmitted to the appropriate State election officials. § 1973gg-5(a)(4)(iii). The state must implement these methods of registering voters, as well as the combined motor vehicle-voter registration form, § 1973gg-3(c)(1), "notwithstanding any other Federal or state law," § 1973gg-2(a). By contrast, Proposition 200 precludes the state from registering applicants who have completed and submitted the Federal Form unless such applicants also mail in, or submit at the designated state office building, documentary proof of citizenship. Ariz. Rev. Stat. §§ 16-152, 16-166. Such a requirement falls under the umbrella of laws displaced by the NVRA's "notwithstanding" language.

Structurally, allowing states to impose their own requirements for federal voter registration on registrants using the Federal Form would nullify the NVRA's procedure for soliciting state input, and aggrandize the states' role in direct contravention of the lines of authority prescribed by Section 7. The NVRA permits states to suggest changes to the Federal Form, but gives the EAC ultimate authority to adopt or reject those suggestions. § 1973gg-7(a). Here, for example, before enacting Proposition 200, Arizona petitioned the EAC to include a requirement in the Federal Form that the applicant present documentary

proof of citizenship analogous to what is required by Proposition 200. Pursuant to the procedure set forth in the NVRA, the EAC denied the suggestion and warned that Arizona "may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." Faced with this denial, Arizona proceeded to implement the requirement in Proposition 200 as a separate state condition to voter registration, which was imposed even on those registering to vote in federal elections with the Federal Form. If the NVRA did not supersede state-imposed requirements for federal voter registration, this type of end-run around the EAC's consultative process would become the norm, and Congress's control over the requirements of federal registration would be crippled. Given that the Elections Clause gives Congress ultimate authority over the federal voter registration process, *Colegrove*, 328 U.S. at 554, such a reading of the NVRA is untenable.

More broadly, Proposition 200 is not in harmony with the intent behind the NVRA, which is to reduce state-imposed obstacles to federal registration. It is indisputable that by requiring documentary proof of citizenship, Proposition 200 creates an additional state hurdle to registration. As indicated in our overview, *supra* Part C.2, the NVRA was sensitive to the multiple purposes of a federal voter registration scheme, including the need "to establish procedures that [would] increase the number of eligible citizens

who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process." § 1973gg(b). The balance struck by the EAC pursuant to § 1973gg-7(a) was to require applicants to attest to their citizenship under penalty of perjury, but not to require the presentation of documentary proof. *Id.* Proposition 200's additional requirement is not consistent with this balance.

Arizona argues that Proposition 200 does not conflict with the NVRA because the NVRA nowhere expressly precludes states from imposing requirements in addition to those of the Federal Form. Focusing on the phrase in the NVRA Section 4 which requires states to "accept and use" the Federal Form to register mail applicants, *see* § 1973gg-4(a)(1), Arizona argues that its registration process complies with the NVRA because the state makes the Federal Form available to applicants, and will accept the Form so long as it is accompanied by documentary proof of citizenship.

Like the petitioners in *Foster,* Arizona has offered a creative interpretation of the state and federal statutes to avoid a direct conflict. *See Foster,* 522 U.S. at 72. But as *Foster* counsels, we do not strain to reconcile the state's federal election regulations with those of Congress under the Elections Clause; rather, we consider whether the additional registration requirement mandated by Proposition 200 is harmonious with the procedures mandated by Congress under a natural reading of the statutes. *See id.* at 74; *Siebold,* 100 U.S. at 384. As explained above, allowing

Arizona to impose Proposition 200's registration provisions on top of the Federal Form conflicts with the NVRA's purpose, procedural framework, and the specific requirement that states use the Federal Form or its equivalent, "notwithstanding any other state or federal law," § 1973gg-2(a). Under Congress's expansive Elections Clause power, we must hold Arizona's documentary proof of citizenship requirement, Ariz. Rev. Stat. §§ 16-152(A)(23), 16-166(F), superseded by the NVRA.[15]

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[15] Because we reach our conclusion based on the language and structure of the statute, we do not rely on the EAC's interpretation of the NVRA or the NVRA's legislative history. Because the parties argue the import of these sources, we merely note that both are consistent with our holding. As discussed *supra* page 17654, the EAC construes the NVRA as not permitting states to "condition acceptance of the Federal Form upon receipt of additional proof." With respect to legislative history, the NVRA's Conference Report, which we have held is the most authoritative and reliable legislative material, *see, e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996), shows that Congress rejected an amendment to the NVRA which would have provided that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration," H.R. Rep. No. 103-66, at 23 (1993). The conferees explained that the amendment was not "consistent with the purposes of" the NVRA and "could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.*

Arizona's remaining arguments do not persuade us to reach a different conclusion. First, Arizona contends that an interpretation of the NVRA that precludes states from imposing additional voter registration requirements for federal elections is unreasonable because Congress could not have intended states to register "any and all" applicants who submit the Federal Form without any outlet for the states to check those applicants' qualifications. Arizona asserts that because the act contemplates that some applications will be rejected, *see* § 1973gg-6(a)(2) (which requires states to notify "each applicant of the disposition of the application"), the NVRA cannot require states to automatically register every individual using the Federal Form.

This argument reflects a misunderstanding of the NVRA. As Section 6 demonstrates, states need not register every applicant who completes and submits the Federal Form. *See* § 1973gg-6(a)(2). Voters still have to prove their eligibility pursuant to the Federal Form. Contrary to Arizona's assertion, the NVRA does not require states to register applicants who are ineligible, or whose forms are incomplete, inaccurate, or illegible.

Second, Arizona argues that states must have freedom to exercise their own methods for determining voter eligibility as a protection against voter fraud. In *ACORN v. Edgar,* the Seventh Circuit considered and discarded a similar argument. In that

case, the state claimed that the "Motor Voter" component of the NVRA "opens the door to voter fraud." 56 F.3d at 795. The court rejected the argument in part because "federal law contains a number of safeguards against vote fraud, and it is entirely conjectural that they are inferior to the protections that [state] law offers." *Id.* at 795-96 (citation omitted).

We reach the same conclusion here. Congress was well aware of the problem of voter fraud when it passed the NVRA, as evidenced by the numerous fraud protections built into the act. For one, Section 10 applies federal criminal penalties to persons who knowingly and willingly engage in fraudulent registration tactics. § 1973gg-10(2). Second, Sections 3 and 7 require the Federal Form and the combined motor vehicle-voter registration form to contain an attestation clause that sets out the requirements for voter eligibility. §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury. §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C). Third, Section 4 permits states to verify the eligibility and identity of voters by requiring first-time voters who register by mail to appear at the polling place in person, where the voter's identity can be confirmed. § 1973gg-4(c). Last, Section 6 requires states to give notice to applicants of the disposition of their registration, which states may use as a means to detect fraudulent registrations. *See* § 1973gg-6(a)(2). Because Congress dealt with the issue of voter fraud in the NVRA, we are not persuaded by Arizona's

claim that states must be permitted to impose additional requirements to address the same issue.

Third, Arizona suggests that Congress's enactment of HAVA, 42 U.S.C. § 15301 *et seq.*, which Congress passed after the NVRA, provides a gloss on the NVRA's meaning. According to Arizona, HAVA demonstrated Congress's intent to permit states to ensure the eligibility of voter registrants, and made clear that states could exceed the minimum requirements of the NVRA in carrying out their registration functions.

We disagree. Congress enacted HAVA in reaction to the 2000 Presidential election and the ensuing controversial Florida recount. *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). The NVRA and HAVA operate in separate spheres: while the NVRA regulates voter registration, HAVA is concerned with updating election technologies and other election-day issues at polling places.

As relevant here, HAVA interacts with the NVRA only on a few discrete issues. First, HAVA added two check-boxes to the Federal Form, requiring applicants to check off whether they are citizens of the United States and whether they are old enough to vote. 42 U.S.C. § 15483(b)(4).

Second, HAVA permits mail registrants who have not previously voted in a federal election to submit documents verifying their identity along with the Federal Form. § 15483(b)(3). First-time voters who take advantage of this provision do not have to show

their identification when they arrive at the polling place, *id.*, a step that the states may otherwise require under the NVRA, *see* § 1973gg-4(c). This option is not, however, a prerequisite to successful registration, as applicants who choose not to submit documentation may still be registered.

Third, HAVA requires states to assign each registrant a "unique identifier" capable of being cross-checked against voters' identities at the polls. § 15483(a)(1)(A). HAVA provides that the unique identifier may be the applicant's driver's license number or the last four digits of the applicant's social security number. *See* § 15483(a)(5)(A). But nothing in HAVA allows the state to require these forms of identification as a prerequisite to registration. Rather, if the applicant possesses neither a driver's license nor social security card, HAVA requires the state to assign the applicant "a number which will serve to identify the applicant for voter registration purposes." § 15483(a)(5)(A)(ii). The unique identifier is not used to check the citizenship of the registrant, but rather to ensure that the voter who appears at the polls is the same person who registered to vote.

Nor does HAVA allow states to exceed the voter registration requirements set forth in the NVRA. In making this argument, Arizona points to the provision in HAVA stating that:

> The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a

> State from establishing election technology and administration requirements that are more strict than the requirements so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law [including the NVRA and other federal voting regulations, § 15545].

§ 15484. But the "election technology and administration requirements" referenced in this section refer to HAVA's requirements that states update election equipment (such as by replacing punch card voting systems) and meet other voting system standards. While § 15484 permits states to institute their own technological and administrative improvements, it does not allow them to impose additional requirements on the voter registration process established by the NVRA. Indeed, the section itself precludes states from adding requirements "inconsistent with the Federal requirements under" the NVRA. § 15484. Moreover, HAVA expressly provides that "nothing [in HAVA] may be construed to authorize or require conduct prohibited under [the NVRA]." § 15545(a)(4). This language indicates Congress's intent was to prevent HAVA from interfering with NVRA's comprehensive voter registration system. Accordingly, Arizona's reliance on HAVA is unavailing.

D

Finally, Arizona argues that we are foreclosed from reviewing Gonzalez's NVRA claim because the prior panel's ruling in *Gonzalez I*, which occurred at

the preliminary injunction phase of this case, already decided that the NVRA does not supersede the changes to Arizona's registration system under Proposition 200. *See Gonzalez I*, 485 F.3d at 1050-51. Arizona asserts that this prior ruling is dispositive, and there is no ground for the court to reconsider the issue here.

Addressing this argument requires us to review the applicability of our law of the case doctrine.[16] Under this doctrine, "one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995) (citation and internal quotation marks omitted). The doctrine applies to prior decisions based on pure issues of law, even those made, as here, in the preliminary stages of review of the same case. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007).

"The effect of the doctrine is not dispositive, particularly when a court is reconsidering its own

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[16] Law of the case is part of a related set of preclusion principles that includes stare decisis, res judicata, and collateral estoppel. 3 James Wm. Moore et al., Moore's Manual: Federal Practice & Procedure, § 30.01. Though linked by the general animating purpose of judicial efficiency, these principles are distinguished by the type or stage of litigation in which they separately apply, and as a consequence each has its own policy considerations. *Id.*

judgment, for the law of the case 'directs a court's discretion, it does not limit the tribunal's power.'" *Mendenhall v. Nat'l Transp. Safety Bd.*, 213 F.3d 464, 469 (9th Cir. 2000) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). In other words, "there is nothing in the Constitution of the United States to require [invocation of the doctrine], or to prevent a [court] from allowing a past action to be modified while a case remains in court." *King v. West Virginia*, 216 U.S. 92, 101 (1910). Instead, the doctrine's utility is typically prudential: "it's a courteous and efficient way for a court to say 'enough's enough' when litigants seek reconsideration of prior interlocutory decisions." *Jeffries v. Wood* (*Jeffries V*), 114 F.3d 1484, 1509 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) (citing cases), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997).

That said, the policies animating the law of the case doctrine are undeniably fundamental. The doctrine "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotation marks omitted). These are paramount concerns to sound judicial administration, as "[a]n appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir. 1979) (internal quotation marks omitted).

Balanced against these valid concerns, however, are equally strong considerations that occasionally pull in the opposite direction. We have held that the "[l]aw of the case should not be applied woodenly in a way inconsistent with substantial justice." *United States v. Miller,* 822 F.2d 828, 832 (9th Cir. 1987); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991) ("[T]he law of the case is an equitable doctrine that should not be applied if it would be unfair."); *Loumar, Inc. v. Smith,* 698 F.2d 759, 762 (5th Cir. 1983) ("The law of the case doctrine is not . . . a barrier to correction of judicial error. It is a rule of convenience and utility and yields to adequate reason. . . ."). Interests of efficiency and finality clash with the responsibility of the court to not issue judgments known to be wrong on the facts or law.

As a compromise between these sometimes countervailing interests, we have identified three exceptional circumstances in which, on balance, we deem the concerns of finality and efficiency outweighed. Law of the case should not operate as a constraint on judicial review where "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice,[17] (2) intervening controlling authority

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[17] As has been noted in prior cases, "[f]or some time, there have existed in the Ninth Circuit two different formulations of the set of circumstances in which a court may decline to follow the law of the case. The first formulation . . . states that a court may depart from the law of the case if 'the previous decision is clearly erroneous and its enforcement would work a manifest

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makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries V*, 114 F.3d at 1489 (internal quotation marks and footnote omitted). Here, Gonzalez argues that the first exception applies. We agree.

The prior panel's conclusion that the NVRA permits state-imposed documentary proof of citizenship requirements on registrants using the Federal Form was based on three provisions of the statute. First, the panel indicated that under the NVRA states must "either 'accept and use the mail voter registration form prescribed by the Federal Election Commission' or, in the alternative, 'develop and use [their own] form,' as long as the latter conforms to the federal guidelines." *Gonzalez I*, 485 F.3d at 1050 (second alteration in original) (citations omitted). Second, the panel asserted that the NVRA "prohibits states from requiring the form to be notarized or otherwise formally authenticated." *Id.* Last, the panel described the NVRA as "permit[ting] states to 'require[ ] such identifying information . . . as is necessary to

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injustice.' In contrast, the second formulation states that a court may decline to follow the law of the case if 'the first decision was clearly erroneous' *or* 'a manifest injustice would otherwise result.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 216 F.3d 764, 787 n.43 (9th Cir. 2000) (citations and brackets omitted), *aff'd on other grounds*, 535 U.S. 302 (2002); *see also Mendenhall*, 213 F.3d at 469 & n.2. As in the other cases noting but not resolving this apparent conflict, we need not settle this issue in the present case, because there are grounds to satisfy the exception under either formulation of the standard.

enable . . . election official[s] to assess the eligibility of the applicant.'" *Id.* (alterations in original). Construing these provisions together, the panel concluded that the statute plainly contemplates allowing states to require voters to present at least some evidence of citizenship at the time of registration. *Id.* at 1050-51.

As may be apparent from our NVRA analysis *supra*, the prior panel's conclusion was rooted in a fundamental misreading of the statute. As the dissent acknowledges, *see* Dissent at 17694-95, the NVRA does not give states freedom "either" to accept and use the Federal Form "or, in the alternative," develop their own form. *See id.* Rather, the NVRA commands without exception that states "shall" accept and use the Federal Form, and if they develop their own form, it can be used only "in addition to" accepting and using the Federal Form, and still must meet all of the criteria of Section 7. *See* § 1973gg-4(a). Thus, while Section 4 of the NVRA applies the limitations of Section 7(b) to the states with respect to the creation of their own state forms, nothing in the text or structure of either provision supports reading Section 7(b) as giving the states any authority over or discretion to modify the Federal Form. Insofar as the prior panel referred to portions of the NVRA that relate to the Federal Form, *see Gonzalez I*, 485 F.3d at 1050, those excerpts are directed solely at the EAC, not the states. *See* § 1973gg-7(a)-(b). These provisions cannot be said to "plainly allow states . . . to require their citizens to present evidence of citizenship when

registering to vote" for federal elections via the Federal Form. *Id.* at 1050-51.

The dissent takes issue with our analysis of the prior panel's opinion, suggesting that the panel may have been using "either . . . or, in the alternative" in a conjunctive sense. Dissent at 17693-95. We disagree. The prior panel's statement that states can "*either* accept and use" the Federal Form "*or, in the alternative*" develop and use their own form cannot reasonably be interpreted to mean that states can *both* accept and use the Federal Form *and also* develop and use their own form. Indeed, such an interpretation would be contrary to the prior panel's logic; the prior panel based its conclusion that states could require registrants using the Federal Form to show additional identification on the ground that states could require use of their own forms in lieu of the Federal Form.

As another basis for upholding the prior panel's opinion, the dissent suggests that the prior panel's conclusion was correct although its reasoning was erroneous, because "accept and use" in § 1973gg-4(a)(1) can be read to mean "accept . . . for a particular purpose [but] not have it be sufficient to satisfy that purpose." Dissent at 17697. In other words, the dissent argues that although states are required to "accept and use" the Federal Form, the NVRA leaves them free to require prospective voters to comply with additional registration requirements beyond those mandated by the Federal Form. As noted above, Arizona makes a similar argument. This argument is

inconsistent with the language and structure of the NVRA. The dissent's strained interpretation would make the EAC's procedure for consultation and development of the Federal Form under Section 7(a) an empty exercise, because any state could require registrants to comply with additional state requirements even if they register with the Federal Form. As discussed above, under an Elections Clause framework, we do not strain the language of the NVRA to render it harmonious with Proposition 200. In the context of the NVRA, "accept and use" can mean only one thing: the states must "accept and use" the Federal Form as a fully sufficient means of registering to vote in federal elections.

Reasoning from a fundamental misreading of the statute, the prior panel reached a conclusion that was clear error. *See Jeffries V,* 114 F.3d at 1489. The text, structure, and purpose of the NVRA simply cannot bear the prior panel's interpretation. Moreover, this case represents an "exceptional circumstance," where the effect of the erroneous decision, were it to stand, would result in a manifest injustice. *Id.* at 1489, 1492. Not only does the erroneous conclusion impede the implementation of a major congressional enactment, but it poses a significant inequity to citizens who are required under the state law to navigate obstacles that do not exist under federal law in pursuit of their fundamental right to vote. *See id.* at 1492 (stating that manifest injustice may be found where the challenged decision involves a "significant inequity"). Though we are sensitive to the cautious

approach courts should take in deciding to alter an earlier panel's decision, because the prior decision in this case not only reached a clearly erroneous result, but reached that result on the basis of a misconstruction of the statute, we are convinced that there are appropriately exceptional circumstances to review the decision here.

The fact that the prior panel's decision was contained in a published opinion does not strip us of our discretion to review its conclusions, because no subsequent published decision has relied upon the prior panel's decision for the proposition to be overturned. *See, e.g., Mendenhall,* 213 F.3d at 469 (reversing a prior published appellate opinion as clearly erroneous under the exceptions to the law of the case); *Tahoe-Sierra,* 216 F.3d at 786-87 (same). Under such circumstances, the law of the circuit doctrine does not preclude us from revising prior decisions in the same case under the established exceptions to the law of the case. *See Jeffries V,* 114 F.3d 1484.

This conclusion was made clear in *Jeffries V,* an en banc decision highlighting the workings of our law of the case doctrine. Although the procedural history of the *Jeffries* decisions is complex,[18] the central

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[18] The *Jeffries* decisions were a series of five opinions in response to a habeas petition by Patrick Jeffries. Jeffries had been sentenced to death by a jury, but petitioned for relief on the ground of juror misconduct (he claimed that one juror had informed other jurors that Jeffries was a convicted armed robber). The district court rejected this claim on the ground that even if

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question addressed in *Jeffries V* was whether *Jeffries IV*, 75 F.3d 491, erred in its application of an exception to the law of the case. The *Jeffries IV* panel held that it could reverse its prior holding in *Jeffries III*, 5 F.3d 1180, under the first exception to the law of the case, because *Jeffries III* was "clearly erroneous and would work a manifest injustice." *Jeffries IV*, 75 F.3d at 494. In *Jeffries V*, we rejected the state's argument that we should avoid reaching the law of the case issue and instead decide the case on the merits, due to the importance of the law of the case doctrine to our jurisprudence. *See* 114 F.3d at 1492. After a careful review of the law of the case doctrine, we

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true, this fact would not have affected the verdict. On appeal, a panel of this court initially upheld the district court's conclusion, *Jeffries v. Blodgett* (*Jeffries I*), 974 F.2d 1179 (9th Cir. 1992), but then granted Jeffries's petition for rehearing and reversed itself on the ground that *Jeffries I* conflicted with precedent. *Jeffries v. Blodgett* (*Jeffries II*), 988 F.2d 923 (9th Cir. 1993). The panel then rejected the state's petition for rehearing, but amended *Jeffries II* to make clear that the claim of juror misconduct, if true, would have had a "substantial and injurious effect" on the verdict. *Jeffries v. Blodgett* (*Jeffries III*), 5 F.3d 1180 (9th Cir. 1993). On remand, the district court held that juror misconduct had in fact occurred and granted Jeffries's petition. *See Jeffries V*, 114 F.3d at 1488. After the state appealed this ruling, the panel again reversed itself, holding that it had interpreted precedent too broadly in *Jeffries III*, and that the law of the case did not prevent reversal of *Jeffries III* because that decision was "clearly erroneous and would work a manifest injustice." *See Jeffries v. Wood* (*Jeffries IV*), 75 F.3d 491 (9th Cir. 1996). Accordingly, the panel reinstated its denial of Jeffries's habeas petition. Jeffries petitioned for rehearing en banc, which we granted to determine, among other things, whether *Jeffries IV* had erred in reversing *Jeffries III*. *See Jeffries V*, 114 F.3d at 1488.

concluded in *Jeffries V* that the *Jeffries IV* panel had erred in overturning *Jeffries III*, because none of the exceptions to the law of the case were applicable. *Id.* at 1489. Focusing on the first exception, *see id.* at 1489 n.2, we concluded that *Jeffries III* was not clearly erroneous, and would not work a manifest injustice, and accordingly *Jeffries IV* had erred in reversing it. *Id.* at 1489.

The decision in *Jeffries V* was also supported on stare decisis grounds. Noting that two Ninth Circuit panels had already relied on *Jeffries III* at the time *Jeffries IV* was decided, *see Thompson v. Borg*, 74 F.3d 1571, 1575 n.1 (9th Cir. 1996); *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995), we stated that a panel "must be exceedingly careful in altering the law of its earlier opinion" in circumstances "when subsequent panels have relied on the initial decision" because "[o]therwise, intra-circuit conflict may arise, posing serious difficulties." *Jeffries V*, 114 F.3d at 1492. Moreover, we noted that "to reach its decision properly, the *Jeffries IV* panel would have had to reverse *Lawson*," which could not properly be done by a three-judge panel. *Id.* In explaining the effect of prior published opinions on the applicability of our exceptions to the law of the case, the en banc court in *Jeffries V* notably did not adopt the view of the dissent in that case that "no three-judge panel may reconsider a rule of law embodied in a prior published opinion," even one in the same case, *Jeffries V*, 114 F.3d at 1511 (Kozinski, J., dissenting). In sum, under our en banc decision in *Jeffries V*, though a panel

cannot overturn prior published opinions in different cases, it may overturn a prior published opinion in the same case if the exceptions to the law of the case are applicable.

In this case, no other panel of this court has relied upon the prior panel's decision for the proposition that the NVRA does not supersede additional state requirements for federal voter registration. Where no subsequent opinion has relied on the prior published opinion for the proposition to be overturned, there is no *stare decisis* problem and consequently the law of the circuit doctrine does not prohibit revising the prior opinion.

Despite our decision in *Jeffries V,* the dissent argues that we are bound by a rule that we can never reverse a prior published opinion, even one in the same case. Dissent at 17684-85. On its face, this is the same rule that was proposed in the *Jeffries V* dissent and rejected by the majority. To overcome this obstacle, the dissent claims that a footnote in *United States v. Washington (Washington IV),* 593 F.3d 790 (9th Cir. 2010) (en banc), overruled *Jeffries V* on this issue. Dissent at 17685.

We disagree. *Washington IV* was heard en banc to resolve an inconsistency between two conflicting lines of precedent on the question whether federal recognition of a tribe has a bearing on that tribe's entitlement to fishing rights under a specific treaty. *See* 593 F.3d at 792-93, 798. In *United States v. Washington* (*Washington III*), 394 F.3d 1152 (9th Cir.

2005), we held that the intervening federal recognition of a tribe "was a *sufficient* condition for the establishment of treaty fishing rights." *Id.* at 1158. But in *Greene v. United States (Greene I)*, 996 F.2d 973, 976-77 (9th Cir. 1993), and *Greene v. Babbitt (Greene II)*, 64 F.3d 1266, 1270-71 (9th Cir. 1995), we held that federal recognition of a tribe could have no effect on treaty fishing rights. On appeal from the district court's decision following *Washington III*, we explained that "the conflict in our precedent led us to rehear the matter en banc without awaiting a three-judge decision." *Washington IV*, 593 F.3d at 798 n.9. This is correct: a three-judge panel could not have resolved the split between *Washington III* and *Greene I* and *II*. The footnote on which the dissent relies further explained that en banc review was necessary because, "[e]ven if the panel could have revisited *Washington III* under one of the exceptions to the law of the case, it still would have been bound by that published opinion as the law of the circuit . . . '[W]e have no discretion to depart from precedential aspects of our prior decision . . . under the general law-of-the-circuit rule.'" *Washington IV*, 593 F.3d at 798 n.9 (citations omitted) (quoting *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)).

In light of the detailed discussion in *Jeffries V* regarding exceptions to the law of the case doctrine, we cannot read this sentence as overruling this longstanding doctrine. While *Jeffries V* was expressly decided on the law-of-the-case ground, nothing in *Washington IV* turned on the law of the case doctrine.

Nor did *Washington IV* expressly consider or overrule our en banc decision in *Jeffries V*. "In our circuit, statements made in passing, without analysis, are not binding precedent." *Thacker v. FCC (In re Magnacom Wireless, LLC)*, 503 F.3d 984, 993-94 (9th Cir. 2007); *see also United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("Of course, not every statement of law in every opinion is binding on later panels. Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case."). The *Washington IV* footnote on which the dissent relies neither exhibits "reasoned consideration" of our law of the case doctrine, *Johnson*, 256 F.3d at 914, nor discusses an issue "germane," *id.*, to the resolution of *Washington IV*. In fact, it can more accurately be described as informational, "casual[,] and without analysis," *id.* at 915. Moreover, the *Washington IV* footnote is silent on the question whether subsequent published opinions had relied on *Washington III*, which *Jeffries V* held could preclude an application of the exceptions to the law of the case. *Jeffries V*, 114 F.3d at 1489. Accordingly, we decline to hold that this footnote overruled *sub silentio* the reasoned analysis of the en banc court in *Jeffries V*.[19]

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[19] The other cases cited by the dissent in support of its version of the law of the circuit doctrine were decided by three-judge

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Because, as set forth above, the prior panel's decision on the NVRA issue meets the standard of a recognized law of the case exception, we have discretion to review that decision, and we have chosen to exercise that discretion here.

E

Perhaps the instructions to the Federal Form put it best in stating: "you can use the application in this booklet to: Register to vote in your State." Under the NVRA, prospective voters seeking to register in federal elections need only complete and submit the Federal Form. If this sounds simple, it is by design. Congress enacted the NVRA to increase federal registration by streamlining the registration process and eliminating complicated state-imposed hurdles to registration, which it determined were driving down voter turnout rates. Proposition 200 imposes such a hurdle. In light of Congress's paramount authority to "make or alter" state procedures for federal elections, *see Foster*, 522 U.S. at 69; *Siebold*, 100 U.S. at 371, we hold that the NVRA's comprehensive regulation of federal election registration supersedes Arizona's documentary proof of citizenship requirement, Ariz. Rev. Stat. §§ 16-152(A)(23), 16-166(F).

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panels and thus could not have overruled *Jeffries V. See Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567 (9th Cir. 2005); *Old Person*, 312 F.3d 1036; *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). One of these cases also pre-dated *Jeffries*. *See Hilao*, 103 F.3d 767.

Because we hold Arizona's registration requirement void under the NVRA, we need not reach Gonzalez's claim that the documentary proof of citizenship requirement imposes greater burdens of registration on naturalized citizens than on non-naturalized citizens and burdens the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.

III

The remainder of our analysis focuses solely on the validity of Arizona's polling place provision, Ariz. Rev. Stat. § 16-579.[20] That statute requires voters to show proof of identification before voting at the polls. *Id.* We first consider Gonzalez's appeal from the district court's decision that Proposition 200 does not violate § 2 of the VRA, 42 U.S.C. § 1973.

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[20] Because Congress's authority under the Elections Clause is limited to preempting regulations related to federal elections, our holding invalidating Proposition 200's registration requirement does not prevent Arizona from applying its requirement in state election registrations. However, Arizona has presented its system of voter registration under Proposition 200 as concurrently registering voters for state and federal elections, and has not indicated that, in the event Gonzalez prevails on the NVRA claim, it plans to establish a separate state registration system. We therefore do not consider whether Proposition 200's registration requirement, as applied only to state registrations, is valid under Gonzalez and ITCA's remaining claims.

A

Section 2(a) of the VRA prohibits states from imposing voting qualifications that result in the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of § 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." § 1973(b). Said otherwise, a plaintiff can prevail in a § 2 claim only if, "based on the totality of the circumstances, the challenged voting practice results in discrimination on account of race."[21] *Farrakhan v. Washington*, 338 F.3d 1009, 1015 (9th Cir. 2003); *see also United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 903 (9th Cir. 2004). A violation of section 2 does not require a showing of discriminatory intent, only discriminatory results. *See Chisom v. Roemer*, 501 U.S. 380, 383 (1991); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998).

In applying the totality of the circumstances test, "a court must assess the impact of the contested

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[21] This approach applies both to claims of vote denial and of vote dilution. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997).

structure or practice on minority electoral opportunities on the basis of objective factors." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (internal quotation marks omitted). In conducting a § 2 analysis, courts are required to make a "searching inquiry" into "how the challenged [state] practice interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by" minorities in the electoral process. *Farrakhan*, 338 F.3d at 1016, 1020 (internal quotation marks omitted). In *Gingles*, the Supreme Court cited a non-exhaustive list of nine factors (generally referred to as the "Senate Factors" because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making this totality of the circumstances assessment. 478 U.S. at 44-45. Relevant here, the factors direct courts to consider the history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206-07). "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Farrakhan v. Gregoire*, 590 F.3d 989, 999 (9th Cir. 2010) (internal quotation marks omitted).

Gonzalez alleges that Proposition 200's registration and polling place identification requirements violate § 2 by disparately affecting Latino voters, unlawfully diluting their right to vote and providing them with less opportunity than other members of the electorate to participate in the political process. Considering statistical evidence on the existence of disparate impact on Latino registrants and voters, the district court determined that the limited statistical disparity between Latinos' registration and voting as compared to the rest of the electorate was not statistically significant. Turning to the Senate Factors listed above, the district court found that Latinos had suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting.

Despite the presence of limited statistical disparity and some of the Senate Factors, however, the district court concluded that Gonzalez's claim failed because there was no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos. The district court noted that not a single expert testified to a connection between the requirement that Latinos show identification under Proposition 200 and the observed difference in voter registration and voting rates of Latinos. Furthermore, the district court held that Gonzalez failed to explain how Proposition 200's requirements

interact with the social and historical climate of discrimination to impact Latino voting in Arizona. Without a causal link between the voting practice and prohibited discriminatory result, the district court concluded that Gonzalez had not proven that Proposition 200 results in discrimination "on account of race or color," and that the claim must therefore be denied.

B

Because a § 2 analysis requires the district court to engage in a "searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45 (internal quotation marks omitted), a district court's examination is "intensely fact-based and localized," *Salt River*, 109 F.3d at 591. We therefore "[d]efer[ ] to the district court's superior fact-finding capabilities," *id.*, and review for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2, *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000) (citing *Gingles*, 478 U.S. at 78-79). We review de novo the district court's legal determinations and mixed findings of law and fact. *Salt River*, 109 F.3d at 591. Again, because we have held that Proposition 200's voter registration requirements are superseded by the NVRA, *supra* Part II, we consider only Proposition 200's requirement that voters show identification at the polls, Ariz. Rev. Stat. § 16-579.

The district court did not clearly err in concluding that Gonzalez failed to establish that Proposition 200's requirements caused any disparate impact on Latinos. To prevail under § 2, a plaintiff must prove "a causal connection between the challenged voting practice and a prohibited discriminatory result." *Salt River*, 109 F.3d at 595 (alteration omitted). "[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Id.* at 595 (emphasis in original) (collecting cases). To prove that such a causal relationship exists, a plaintiff need not show that the challenged voting practice caused the disparate impact by itself. *See Farrakhan*, 338 F.3d at 1018-19. Rather, pursuant to a totality of the circumstances analysis, the plaintiff may prove causation by pointing to the interaction between the challenged practice and external factors such as surrounding racial discrimination, and by showing how that interaction results in the discriminatory impact. *Id.* at 1019. But even under this broad totality of the circumstances analysis, the causation requirement is crucial: a court may not enjoin a voting practice under § 2 unless there is evidence that the practice results in a denial or abridgement of the rights of a citizen on account of race or color. § 1973(a). If there is no evidence that the voting practice resulted in any such disparate impact, there is no violation and thus no basis for injunctive relief.

The district court correctly applied this standard here. The challenged practice at issue is Proposition

200's requirement that voters show identification at the polls. To prove causation, Gonzalez had to establish that Proposition 200's requirement that voters must produce forms of identification, as applied to Latinos, resulted in a prohibited discriminatory result. Here, Gonzalez alleged in his complaint that "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to . . . cast a ballot," but produced no evidence supporting this allegation. The record does include evidence of Arizona's general history of discrimination against Latinos and the existence of racially polarized voting. But Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice. Without such evidence, we cannot say that the district court's finding that Gonzalez failed to prove causation was clearly erroneous. Therefore we affirm the district court's denial of this claim.[22]

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[22] Gonzalez also argues that the district court erred in evaluating one of the Senate Factors and in concluding that the disparate impact on Latinos was statistically insignificant. Because Gonzalez's failure to show causation is dispositive, however, we need not reach these issues.

IV

Gonzalez I, which considered Gonzalez and ITCA's appeal from the district court's denial of a preliminary injunction, concluded that Arizona's registration identification requirement was not a poll tax. *See* 485 F.3d at 1049. We held that the registration requirement did not (1) force voters "to choose between paying a poll tax and providing proof of citizenship when they register to vote," the standard set forth in *Harman v. Forssenius,* 380 U.S. 528, 541-42 (1965); and did not (2) "make[ ] the affluence of the voter or payment of any fee an electoral standard," as was held impermissible under the Fourteenth Amendment in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 666 (1966). *Gonzalez I,* 485 F.3d at 1049 (internal quotation marks omitted) (brackets in original).

Here, Gonzalez and ITCA argue that Proposition 200 imposes an unconstitutional poll tax in violation of the Twenty-fourth Amendment. Separately, ITCA asserts that Proposition 200 is also a poll tax under the Fourteenth Amendment. Guided by the analysis in *Gonzalez I,* we conclude that Proposition 200's polling place identification requirement is not a poll tax under either constitutional provision.

A

The Twenty-fourth Amendment provides that:

> The right of citizens of the United States to vote in any primary or other election for

> President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States for or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV.

Gonzalez does not argue that requiring voters to show identification at the polls is itself a poll tax. Rather, Gonzalez argues that, because some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote.

This analysis is incorrect. Although obtaining identification required under Arizona's statute may have a cost, it is neither a poll tax itself (it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax. *Cf. Harman*, 380 U.S. at 541-42.

Our conclusion is consistent with *Harman*, the only Supreme Court case considering the Twenty-fourth Amendment's ban on poll taxes. In that case, the Court considered a state statute that required voters to either pay a $1.50 poll tax on an annual basis or go through "a plainly cumbersome procedure," *id.* at 541, for filing an annual certificate of residence. *Id.* at 530-32. There was no dispute that the $1.50 fee was a poll tax barred by the Twenty-Fourth Amendment. *See id.*

at 540. Accordingly, the only question before the Court was whether the state "may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence." *Id.* at 538. The Court enunciated the rule that a state may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 542. Applying this rule, the Court determined that the state's certificate of residence requirement was a material burden: among other things, the procedure for filing the certificate was unclear, the requirement that the certificate be filed six months before the election "perpetuat[ed] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," and the state had other alternatives to establish that voters were residents, including "registration, use of criminal sanction[s], purging of registration lists, [and] challenges and oaths." *Id.* at 541-43. Accordingly, the Court concluded that "[w]e are thus constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

Arizona's polling place requirement is not analogous. Proposition 200's requirement that voters identify themselves at the polling place is not a poll tax, as stated in *Gonzalez I.* 485 F.3d at 1049. Voters have only to verify their eligibility by showing identification at

the polls,[23] which does not constitute a tax, a point which Gonzalez does not dispute. Nor does Proposition 200's identification requirement place a material burden on voters "solely because of their refusal to waive the constitutional immunity" to a poll tax. *Harman,* 380 U.S. at 542. Voters are not given the choice between paying a poll tax or obtaining identification; all voters are required to present identification at the polling place. *See Gonzalez I,* 485 F.3d at 1049. *Cf. Harman,* 380 U.S. at 541-42. Because "Arizona's system does not, as a matter of law, qualify as a poll tax," the district court was correct in concluding that Proposition 200's requirement of identification at the polling place did not violate the Twenty-fourth Amendment. *See Gonzalez I,* 485 F.3d at 1049.

B

Nor is Proposition 200's requirement that voters show identification at the polling place a poll tax under the Fourteenth Amendment's Equal Protection Clause.[24] *Harper* is the leading Supreme Court case

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[23] Voters who use an early ballot to vote do not even have to show identification. Ariz. Rev. Stat. § 16-550(A) (for early ballots, elector identity is verified by signature comparison alone).

[24] ITCA's briefing collapses the Twenty-fourth Amendment and Fourteenth Amendment poll tax claims into a single argument. But these are different claims that arise under different constitutional amendments. The Twenty-fourth Amendment extends only to federal elections, *see Harman,* 380 U.S. at 540 (holding that "the Twenty-fourth Amendment abolish[ed] the

(Continued on following page)

considering whether a state law is a poll tax under the Equal Protection Clause. In *Harper*, the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals exercising their right to vote in the state was unconstitutional under the Equal Protection Clause. *Id.* at 665-66 & n.1. The Court held that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications," *id.* at 668, and that the imposition of poll taxes fell outside this power because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," *id.* Because the state's poll tax made affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter qualifications, the Court concluded that the tax was invidiously discriminatory and a per se violation of the Equal Protection Clause. *Id.* at 666-67.

Arizona's polling place identification requirement falls outside of *Harper*'s rule that "restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (plurality opinion). The requirement that individuals show documents proving their identity is not an invidious classification based on impermissible standards of wealth or

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poll tax as a requirement for voting in federal elections"), while the Fourteenth Amendment also invalidates restrictions on the right to vote in state elections, *see Harper*, 383 U.S. at 666. Therefore, we have addressed these claims separately.

affluence, even if some individuals have to pay for them. On the contrary, requiring individuals to show identification falls squarely within the state's power to fix core voter qualifications. Photo identification addresses the most basic voter criterion: that individuals seeking to cast a ballot are who they purport to be and are in fact eligible to vote. Even ITCA admits that this is a valid state interest.

ITCA argues that the Court's more recent decision in *Crawford*, 128 S.Ct. 1610,[25] extended *Harper*'s holding to include a prohibition on indirect fees, such as fees or costs necessary to obtain required identification documents. ITCA seeks the benefit of *Harper*'s per se rule that such an electoral standard is invidiously discriminatory, and thus violates the Equal Protection Clause.

This argument is not consistent with *Crawford*. *Crawford* involved an Indiana state requirement that a citizen voting in person or at the office of the circuit court clerk before election day present a photo identification card issued by the government. *Id.* at 1613. The state would provide a free photo identification to

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[25] *Crawford* was decided by the Supreme Court after this court's holding in *Gonzalez I*. ITCA frames *Crawford* as an "intervening controlling authority" that provides a basis for this court to reconsider its decision in *Gonzalez I* that Arizona's registration requirement is not a poll tax. Because *Gonzalez I* did not address whether the polling place identification requirement constituted a poll tax, see 485 F.3d at 1048-49, we need not address this argument.

"qualified voters able to establish their residence and identity." *Id.* at 1614. A number of plaintiffs challenged this requirement on the ground that the "new law substantially burdens the right to vote in violation of the Fourteenth Amendment." *Id.*

Although the Court was unable to agree on the rationale for upholding Indiana's photo identification requirement,[26] neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied to Indiana's photo identification requirement. *See id.* at 1624. The lead opinion, upon which ITCA relies, explained that *Harper*'s "litmus test" made "even rational restrictions on the right to vote . . . invidious if they are unrelated to voter qualifications." *Id.* at 1616. But according to the lead opinion, later election cases had moved away from *Harper* to apply a balancing test to state-imposed burdens on the voting process. *Id.* Under these later cases, a court "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* The lead opinion then proceeded to apply this balancing test to the Indiana photo identification requirement. *Id. Crawford* did not purport to overrule *Harper,* however, which remains as an example of an electoral standard for

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[26] The lead opinion authored by Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia filed a concurring opinion joined by Justices Thomas and Alito. The other three justices dissented.

which a state would never have sufficiently weighty interests to justify the requirement that a fee be paid in order to vote. *Id.* Because *Crawford* did not extend *Harper*'s per se rule to other burdens imposed on voters, but left it applicable only to poll tax requirements, *Crawford* does not support ITCA's argument that Proposition 200's identification requirement is per se invalid under *Harper*.

Although ITCA's reliance on *Crawford* is not entirely clear, ITCA does not appear to argue that Proposition 200's identification requirement is invalid under *Crawford*'s balancing test. ITCA does not, for example, claim that the burden imposed by the photo identification was impermissibly heavy in light of Arizona's legitimate interests. Such an argument would be unavailing in any event. The lead opinion in *Crawford* held that the burden imposed on citizens who must obtain a photo identification document was not sufficiently heavy to support a facial attack on the constitutionality of the state law, in light of the state's legitimate interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. *Id.* at 1617, 1623. The same reasoning is applicable here. While the lead opinion noted that photo identification cards were provided free by Indiana, the lead opinion also recognized that to obtain Indiana's free photo identification cards, individuals were required to "present at least one 'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Id.* at 1621 n.17. Obtaining these

primary documents, the Supreme Court acknowledged, may require payment of a fee. *Id.* Because Proposition 200 identification requirements include these same sorts of primary documents, Proposition 200's requirements are no more burdensome than those upheld by *Crawford*. ITCA does not argue that Arizona's interests in imposing a photo identification requirement are any less weighty than Indiana's interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. Therefore, even under the balancing test set forth in the *Crawford* lead opinion, we would uphold Proposition 200's polling place identification requirement against a facial challenge.

In sum, because any payment associated with obtaining the documents required under Proposition 200's photo identification provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under *Harper*, and the burden is minimal under *Crawford*. As such, Arizona's polling place photo identification requirement does not violate the Fourteenth Amendment's Equal Protection Clause.

V

Our system of dual sovereignty, which gives the state and federal governments the authority to operate within their separate spheres, "is one of the Constitution's structural protections of liberty." *Printz v.*

United States, 521 U.S. 898, 921 (1997). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting *Gregory*, 501 U.S. at 458). Despite our respect for the state's exercise of its sovereign authority, however, the Constitution's text requires us to enforce the specific enumerated powers that are bestowed on the federal government and denied to the states. The authority granted to Congress under the Elections Clause to "make or alter" state law regulating procedures for federal elections is one such power. The Framers of the Constitution were clear that the states' authority to regulate extends only so far as Congress declines to intervene. U.S. Const. art. 1, § 4, cl. 1; *e.g.*, *Foster*, 522 U.S. at 69. Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA, which implemented a comprehensive national system for registering federal voters, supersedes Arizona's conflicting voter registration requirement for federal elections. We uphold Arizona's polling place identification requirement with respect to all other claims.[27]

AFFIRMED in part and REVERSED in part.

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[27] Each party will bear its own costs on appeal.

Chief Judge KOZINSKI, dissenting in large part:*

As the majority belatedly acknowledges 47 pages into its opinion, we don't come to this case with a blank slate. A prior panel has already held in a published opinion that Proposition 200 isn't preempted because the National Voter Registration Act ("NVRA") "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2007) ("*Gonzalez I*"). That is law of the circuit and therefore binding on us. *See, e.g., Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Even if it weren't, it's law of the case and can't be lightly disregarded for that reason. *See, e.g., Merritt v. Mackey*, 932 F.2d 1317, 1322 (9th Cir. 1991). The majority refuses to accept the consequences of this reality. First, it evades law of the circuit by creating an exception that is squarely foreclosed by a recent unanimous en banc opinion. The majority then weakens our rules governing law of the case by declaring that *Gonzalez I*'s interpretation of the NVRA is "clearly erroneous" when it's clearly not. Because I believe that we must take precedent seriously and that *Gonzalez I* was correctly

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* I concur in the portion of the judgment upholding Proposition 200's polling place provision, Ariz. Rev. Stat. § 16-579. For the reasons articulated by the district court in its thorough decision, I would affirm its ruling in favor of Arizona on the equal protection and Voting Rights Act challenges to Proposition 200's voter registration requirement.

decided, I dissent from the majority's conclusion that the NVRA preempts Arizona's voter registration requirement.

I.

The fundamental rule of circuit law is that once a panel decides a legal issue in a published opinion, that ruling binds subsequent three-judge panels. The only instance when a three-judge panel may depart from a prior published opinion is if there has been "intervening" higher authority that is "clearly irreconcilable with our prior circuit authority." *Miller*, 335 F.3d at 900. And this instance is not truly an exception to the rule because it's the intervening higher authority, not the three-judge panel, that overrules the earlier opinion. There are in fact *no* exceptions to law of the circuit, or at least there weren't until today.

The majority holds that, although a published opinion is binding generally, it doesn't bind later panels in the same case. For those panels, "[w]here no subsequent opinion has relied on the prior published opinion for the proposition to be overturned, . . . the law of the circuit doctrine does not prohibit revising the prior opinion." Maj. at 17668.

This exception to the published opinion rule is irreconcilable with our recent en banc opinion in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*"). In that case, the three-judge panel was confronted with a conflict between a prior opinion in the same case and another

panel's opinion in a different case. Because it lacked the power to resolve the conflict, the three-judge panel had to call the case en banc sua sponte. Sitting en banc, we held:

> This appeal was initially argued to a three-judge panel, but the conflict in our precedent led us to rehear the matter en banc without awaiting a three-judge decision. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc). This step was necessary because, even if the panel could have revisited *Washington III* under one of the exceptions to law of the case, *see Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc), it still would have been bound by that published opinion as the law of the circuit, *see, e.g., Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) ("[W]e have no discretion to depart from precedential aspects of our prior decision in *Old Person I*, under the general law-of-the-circuit rule.").

Washington IV, 593 F.3d at 798 n.9.

Applying the *Washington IV* rule to this case is simple. "*[E]ven if*" our three-judge panel were permitted to revisit the prior panel's opinion "under one of the exceptions to law of the case," we are "*still* . . . bound by that published opinion *as the law of the circuit*" and have "*no discretion* to depart from [it]." *Id.* (emphasis added). *Washington IV* – which clearly holds that law of the circuit trumps law of the case – forecloses the majority's theory.

The majority brushes aside *Washington IV*, relying instead on three earlier cases, foremost *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (en banc) ("*Jeffries V*"). There are two problems with the majority's reliance on *Jeffries V*, both of which are fatal to the majority's new rule. First, *Jeffries V* was about law of the case, not law of the circuit. *Jeffries V* held that the three-judge panel in *Jeffries IV* erred by failing to follow *Jeffries III*, and based this conclusion on law of the case. 114 F.3d at 1492-93. The majority makes much of the fact that the dissent in *Jeffries V* would have resolved the case on law of the circuit grounds. Maj. at 17668. But it is peculiar indeed to impute a *holding* to the majority on an issue it never addressed, because it chose not to follow the contrary reasoning of the dissent. A dissent has no precedential value, *United States v. Ameline*, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (en banc), and the majority is surely not obligated to address every argument made there. It is obviously dangerous to infer that the majority ruled on a matter as to which it never expressed an opinion. By that peculiar reasoning, a majority can be held to have decided an issue – and made it law of the circuit – when it never said a word on the subject.

The *Jeffries V* majority had very little to say about law of the circuit, and what it did say totally undermines the majority here: "The dissent seems to acknowledge that [the] law of the circuit doctrine would preclude the *Jeffries IV* panel from contradicting the *Jeffries III* opinion, thus reaching the same

result as the majority." *Id.* at 1493 n.12. The majority somehow manages to squeeze blood from a turnip.

Second, to the extent *Washington IV* says something different from *Jeffries V*, it is the most recent en banc opinion and therefore clearly controls. *See United States v. Heredia*, 483 F.3d 913, 918-19 (9th Cir. 2007) (en banc) (recognizing that a later en banc court may overrule an earlier en banc opinion). The majority objects that *Washington IV* couldn't have overruled the "longstanding doctrine" that a three-judge panel may overturn a prior panel's published opinion under an exception to the law of the case, maj. at 17669, but the doctrine in fact never existed until today. It has no support in *Jeffries V* or any other published opinion in our circuit.

Take the other two cases the majority cites. *See* Maj. at 17666 (citing *Mendenhall v. NTSB*, 213 F.3d 464, 469 (9th Cir. 2000) ("*Mendenhall II*"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 786-87 (9th Cir. 2000) ("*Tahoe IV*")). The majority claims these cases support its new rule because both reversed "a prior published appellate opinion as clearly erroneous under the exceptions to the law of the case" doctrine. Maj. at 17666. But neither case contradicted the prior panel's legal ruling and therefore never disturbed the law of the circuit. *See United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) (a legal statement isn't law of the circuit unless "it is clear that a majority of the panel has focused

on the legal issue presented by the case before it and made a deliberate decision to resolve the issue").[1]

The later *Mendenhall* panel reversed an award of market-rate attorney's fees, *Mendenhall II*, 213 F.3d at 469 & n.3, but didn't overturn the prior panel's statement that "a request [for] attorneys' fees at a reasonable market rate. . . . is appropriate where there is a showing of bad faith," *Mendenhall v. NTSB*, 92 F.3d 871, 876 (9th Cir. 1996). Rather, it realized that the prior panel had mistakenly applied a statute awarding attorney's fees to litigants who prevailed in court to someone who had prevailed in an administrative

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[1] While the majority ignores *Johnson* when exaggerating the precedential effect of two cases that didn't alter the law of the circuit, it relies on the *Johnson* concurrence in an attempt to characterize *Washington IV*'s rule as the sort of "casual[]" statement "uttered in passing" that isn't binding on later panels. Maj. at 17669-70. But the statement in *Washington IV* was necessary to explain why the three-judge panel had to make a sua sponte en banc call. 593 F.3d at 798 n.9. In any event, statements in en banc opinions, as in Supreme Court opinions, must be taken far more seriously than statements in three-judge panel opinions, even if they are not strictly necessary to the result. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference. . . ."). That's because, like *Washington IV*'s rule, a statement in an en banc opinion that's not necessary to resolve the merits of the case often "provides a supervisory function" to "three-judge panels and district courts. . . . [and] thus constitutes authoritative circuit law." *Barapind v. Enomoto*, 400 F.3d 744, 751 n.8 (9th Cir. 2005) (en banc); *see, e.g.*, *Miller*, 335 F.3d at 900; *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

proceeding. *Mendenhall II*, 213 F.3d at 469. Because the later panel applied the correct statute, it had no occasion to disturb the prior panel's construction of the other statute.

In *Tahoe*, both the earlier panel and the later panel applied the rule that, in general, defendants must affirmatively plead the statute of limitations in a filing with the court. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir. 1993). The prior panel had held that the plaintiffs' claims weren't time-barred because, by "[f]ailing to plead affirmatively" any statute of limitations other than an irrelevant one, the defendants couldn't then "rely on any other." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753, 756 (9th Cir. 1994) ("*Tahoe III*"). On remand, the defendants filed an answer that pled the correct statute of limitations, and the later panel held that the claims were therefore time-barred. *Tahoe IV*, 216 F.3d at 788-89. Like *Mendenhall*, the later panel's putative reversal of a prior panel didn't alter a binding statement of circuit law.[2]

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[2] *Tahoe IV* said that it overturned *Tahoe III*'s "bare legal holding . . . that the defendants forfeited the correct statute of limitations defense." *Tahoe IV*, 216 F.3d at 788. If that were truly *Tahoe III*'s holding, then the subsequent panel would have overturned law of the circuit. But it wasn't. *Tahoe III* said only that the defendants couldn't rely on a statute of limitations they hadn't pled. Because the defendants hadn't filed their answer, *Tahoe III* couldn't have considered whether they waived their statute of limitations defense.

Nor are *Mendenhall* and *Tahoe* the only cases on point. A number of panel opinions hold that law of the circuit applies to later panels in the same case. *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002), which *Washington IV* quotes, is a good example. The *Old Person* panel explained that it was bound by a prior opinion because "none of the three exceptions" to law of the case applied, but it was careful to point out that it also had "no discretion to depart from precedential aspects of our prior decision in *Old Person I,* under the general law of the circuit rule." *Id.*; *see also Minidoka Irrigation Dist. v. Dep't of Interior,* 406 F.3d 567, 574 (9th Cir. 2005) ("[W]e are 'bound by the opinion of the prior panel as the law of the case. Also we have no discretion to depart from precedential aspects of our prior decision in [*Minidoka I*], under the general law-of-the circuit rule.'" (second alteration in original)); *accord Hilao v. Estate of Marcos,* 103 F.3d 767, 772 (9th Cir. 1996) ("This court has twice rejected these arguments in *Estate I* and *Estate II.* The published decisions in those cases are both the controlling law of the circuit and the law of this case." (citations omitted)).

Like *Washington IV,* these opinions explain that three-judge panels are bound by prior panel opinions as law of the circuit even if they're not bound by those decisions as law of the case. They also reconcile *Mendenhall II* and *Tahoe IV* with our law of the circuit rule, for neither of those cases departed from "precedential aspects" of the prior panel opinions. But even if *Mendenhall* and *Tahoe* stood for what the

majority claims, our three-judge panel doesn't have the power to elevate them above *Old Person*, *Minidoka* or *Hilao*. If "faced with such a conflict," we "*must* call for en banc review, which the court will normally grant unless the prior decisions can be distinguished." *Atonio*, 810 F.2d at 1479 (emphasis added).[3]

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[3] We're not alone. Most of our sister circuits agree that three-judge panels must follow prior published opinions in the same case as law of the circuit. *See, e.g., Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) ("Because our previous decision was published, the prior panel precedent rule also applies to any holdings reached in the earlier appeal."); *Swipies v. Kofka*, 419 F.3d 709, 714 (8th Cir. 2005) ("[W]e held in an earlier appeal in this case that Mr. Swipies possessed such an interest. We are bound to follow this holding. It is not only the law of the case, but the law of the circuit, *i.e.*, a decision of another panel which only the court *en banc* may overturn." (citations omitted)); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 367 n.6 (5th Cir. 2004) ("The subsequent panel would not only have to forego application of the law of the case doctrine, but would also have to discard the well-established rule that circuit panels are 'bound by the precedent of previous panels absent an intervening . . . case explicitly or implicitly overruling that prior precedent.'" (alteration in original)); *United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003) ("[T]hose issues are barred by law of the case doctrine. . . . In addition, the law of the circuit doctrine applicable here prevents a new appellate panel from declining to follow the legal rulings of the panel in a prior appeal."); *Craft v. United States*, 233 F.3d 358, 369 (6th Cir. 2000) ("Our decisions in *Craft I* and in *Cole* are also law of the circuit. As we recently stated, 'One panel of this court may not overturn the decision of another panel of this court – that may only be accomplished through an en banc consideration of the argument.'"), *overruled on other grounds* by *United States v. Craft*, 535 U.S. 274 (2002); *Irving v. United States*, 162

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Ultimately, this is all academic. There's just no getting around *Washington IV*'s holding that "even if" we were permitted to revisit the prior panel's opinion "under one of the exceptions to law of the case," we are "still . . . bound by that published opinion as the law of the circuit" and have "no discretion to depart from [it]." 593 F.3d at 798 n.9. We can debate the meaning of *Jeffries* all we want, but a unanimous en banc court in *Washington IV* just resolved this very issue against the majority's position. The majority here audaciously contradicts this en banc opinion.[4]

F.3d 154, 160 (1st Cir. 1998) (en banc) ("In *Irving I*, a panel of this court expressly defined the contours of the discretionary function exception. From then on, that methodology represented both the law of the case and the law of this circuit regarding the due application of the discretionary function exception. . . . Indeed, when the United States asserted the discretionary function defense in *Irving II*, the panel . . . took refuge in the law of the circuit doctrine to dispense the argument. . . ." (citation omitted)); *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998) ("Absent any intervening Supreme Court decisions, *Curtis* and *South-Suburban* would be binding precedent on this issue, and *Curtis* would also be the law of the case."). Such a lopsided verdict from our peers provides yet another reason to question the wisdom of departing from our circuit's well-settled published opinion rule.

[4] To the extent the majority suggests a three-judge panel can overrule published opinions because they're "clearly erroneous," it also conflicts with *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc). *Contreras* reversed the portion of a panel opinion that had purported to overrule several clearly erroneous published opinions because the panel lacked authority to do so – even though the en banc court then adopted the panel's legal analysis. *Id.* at 1136; *cf. State Oil Co. v. Khan*, 522

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II.

Even if the majority were right that law of the circuit doesn't apply, *Gonzalez I* undisputedly binds us as law of the case. The majority tries in vain to wriggle out from under *Gonzalez I*'s conclusion that the NVRA doesn't preempt Proposition 200 by invoking the "clearly erroneous" exception to the law of the case. Maj. at 17665-66. But the clearly erroneous bar is a tall one to hurdle: If "it is plausible to find that" the NVRA doesn't preempt Proposition 200, "the holding in [*Gonzalez I*] cannot be deemed clearly erroneous." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir. 1995). "[I]t is incumbent upon [plaintiffs] to convince us not only that the majority decision in [*Gonzalez I*] was wrong, but that it was clearly wrong." *Merritt*, 932 F.2d at 1322; *see also Jeffries V*, 114 F.3d at 1489. The majority fails to carry this heavy burden and materially weakens the standard for all future cases by pretending that it does.

A.

According to the majority, the *Gonzalez I* panel's "conclusion was rooted in a *fundamental misreading* of the statute." Maj. at 17664 (emphasis added). "*Reasoning* from a fundamental misreading of the statute, the prior panel reached a conclusion that was clear

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U.S. 3, 20 (1997) (court of appeals was correct not to overrule an "infirm[ ]" Supreme Court decision that it rightly predicted would be overturned by the Supreme Court).

error." *Id.* at 17665 (emphasis added). But we don't examine prior panels' *reasoning*. We must follow *Gonzalez I* unless the "*decision* . . . is so clearly incorrect that we are justified in refusing to regard it as law of the case." *Merritt*, 932 F.2d at 1321 (emphasis altered); *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[T]he law of the case turns on whether a court previously 'decide[d] upon a rule of law' . . . not on whether, or how well, it explained the decision." (second alteration in original)).

We might "scrutinize the merits . . . with greater care" if *Gonzalez I* lacked any "analysis reflecting the authorities or argument which led [it] to the rule [it reached]." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986). But the law of the case doctrine doesn't allow us to assume that poor reasoning begets clear error. Indeed, we've held that a panel's failure to "expressly address [a] claim in its opinion" – and corresponding failure to offer any reasons for its resolution of that claim – *isn't* clearly erroneous. *Leslie Salt*, 55 F.3d at 1393.

A panel's faulty reasoning doesn't necessarily consign its conclusion to the trash heap; most conclusions can be arrived at through multiple chains of reasoning. And, although "panels will *occasionally* find it appropriate to offer alternative rationales," *Johnson*, 256 F.3d at 914 (emphasis added), they're not required to do so. Thus, the existence of perceived holes in a prior panel's stated rationale doesn't preclude the possibility that the panel had unstated reasons leading it to the same conclusion. It certainly doesn't mean that the result the panel reached is

incorrect, as it may have reached the correct result for the wrong reason.[5] When we say that a panel's holding is clearly wrong, what we're talking about is the rule of law it announces, not the method by which it adopts that rule.[6]

This distinction doesn't matter here because *Gonzalez I* wasn't clearly erroneous in either reasoning or result. Let's start with *Gonzalez I*'s statement that "[t]he NVRA mandates that states either 'accept and use the mail voter registration form prescribed by the [Election Assistance Commission,]' or, in the alternative, 'develop and use [their own] form,' as long as the latter conforms to the federal guidelines." *Gonzalez I*, 485 F.3d at 1050 (third alteration in

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[5] This principle also informs our review of district court judgments. "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980).

[6] Focusing on a panel's reasoning defeats the fundamental purpose of law of the case doctrine – protecting the court and the parties from the burden of repeated argument by pertinacious litigants – by encouraging the parties to relitigate their case. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 667 (2d ed. 2002). Such relitigation can slow decisionmaking to a glacial pace, which is what happened to administrative agencies when judges began to allow litigants to challenge the reasons the agencies gave for the new regulations they proposed. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1385-86, 1400-03 (1992); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1390-91 & n.17 (2004).

original) (citations omitted). The majority takes issue with this passage because the NVRA requires states to accept and use *both* the federal and state forms; ergo, *Gonzalez I* misconstrued the statute. Maj. at 17664. But "the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." *De Sylva v. Ballentine,* 351 U.S. 570, 573 (1956). Indeed, it is well recognized that "or" can have multiple meanings, with the "exclusive or" – meaning one or the other but not both – being largely useful in symbolic logic rather than common parlance. Wikipedia, Exclusive or, http://en.wikipedia.org/wiki/Exclusive_or (last visited Aug. 21, 2010).[7]

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[7] Wikipedia gives the following example to illustrate the difference between the exclusive and the inclusive "or":

> [I]t might be argued that the normal intention of a statement like "You may have coffee, or you may have tea" is to stipulate that exactly one of the conditions can be true. Certainly under many circumstances a sentence like this example should be taken as forbidding the possibility of one's accepting both options. Even so, there is good reason to suppose that this sort of sentence is not disjunctive at all. If all we know about some disjunction is that it is true overall, we cannot be sure that either of its disjuncts is true. For example, if a woman has been told that her friend is either at the snack bar or on the tennis court, she cannot validly infer that he is on the tennis court. But if her waiter tells her that she may have coffee or she may have tea, she can validly infer that she may have tea. Nothing classically thought of as a disjunction has this property. This is so even given that she might

(Continued on following page)

Legislatures – which presumably choose statutory language with care – have used "or" conjunctively instead of as a disjunctive, exclusive "or." *See, e.g., Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, 420 U.S. 395, 417-18 (1975) ("utilizing the surplus water or water power"); *Swearingen v. United States*, 161 U.S. 446, 450 (1896) ("obscene, lewd or lascivious"); *see also* Steven Wisotsky, *How To Interpret Statutes – Or Not: Plain Meaning and Other Phantoms*, 10 J. App. Prac. & Process 321, 326-27 (2009). And phrases that seem obviously disjunctive like "or, in the alternative" are sometimes used conjunctively. *See* H.W. Fowler, *A Dictionary of Modern English Usage* 147 (2d ed. 1965). Thus, the *Gonzalez I* panel could have meant that a state may rely exclusively on the federal form or, in the alternative, also develop a state form.[8] This is a perfectly accurate description of the NVRA.

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reasonably take her waiter as having denied her the possibility of having both coffee and tea.

. . . .

There are also good general reasons to suppose that no word in any natural language could be adequately represented by the binary exclusive "or" of formal logic.

Wikipedia, Exclusive or, http://en.wikipedia.org/wiki/Exclusive_or (last visited Aug. 21, 2010).

[8] Our own precedent shows that "and" and "or" can sometimes be used interchangeably. For example, in *MacDonald v. Pan American World Airways, Inc.*, the majority construed "and" in a contract as "or" despite a particularly eloquent dissent. 859 F.2d 742, 744-45 (9th Cir. 1988); *see id.* at 746 (Kozinski, J.,

(Continued on following page)

The majority protests that *Gonzalez I* couldn't have used "or" conjunctively because "such an interpretation would be contrary to the prior panel's logic." Maj. at 17664. But it's only contrary to the *majority*'s *interpretation* of the prior panel's logic – and the majority begins its interpretation by assuming *Gonzalez I* misread the statute. This is known as begging the question. If we begin with the presumption that unanimous three-judge panels don't misread statutes, the "or" can easily be construed conjunctively, to support the conclusion that *Gonzalez I* interpreted the NVRA correctly. *Cf. United States v. Brown*, 459 F.3d 509, 525 (5th Cir. 2006) ("[I]f we begin with the assumption that [the defendant] is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that [he] is not guilty . . . , we must conclude the evidence is insufficient. . . .").

The other two quotes to which the majority points support its argument even less. *Gonzalez I* states that section 1973gg-7(b) of the NVRA "prohibits states from requiring that [their] form be notarized or otherwise formally authenticated," and "permits states to 'require[ ] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant.'" 485 F.3d at 1050 (alterations in original). The majority argues that

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dissenting). *MacDonald* is law of the circuit as to the "and" versus "or" issue and stands in the way of the majority's claim that the *Gonzalez I* panel somehow misread the statute.

Gonzalez I "misread" the statute because the "portions of the NVRA that relate to the Federal Form . . . are directed solely at the [Election Assistance Commission], not the states." Maj. at 17664. But these instructions to the Commission *do* apply to the states through section 1973gg-4(a)(2), which allows states to "develop and use" their own form if it "meets all of the criteria stated in section 1973gg-7(b)." *Gonzalez I* reads the statute correctly; it is the majority here that is mistaken.

B.

Even if the majority's reasoning is wrong, its conclusion that *Gonzalez I* clearly erred could still be correct if the NVRA *must* be read to preempt state law. But it's not enough for the majority to find a construction of the statute it likes better. After all, many statutes can plausibly be construed two different ways, neither of which can be said to be clearly wrong. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." (emphasis added)). To be clearly erroneous, the prior panel's construction must be so flawed that it could not pass the second step of the *Chevron* test, had that construction been adopted by an administrative agency. *See id.* at 844 ("[A] court may not substitute its own construction of a statutory

provision for a *reasonable* interpretation made by the administrator of an agency." (emphasis added)).

In this case, the text of the NVRA doesn't "directly address[ ] the precise question at issue," *id.* at 843, namely whether states can ask for supplemental proof of citizenship. The statute says that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [Election Assistance Commission]." 42 U.S.C. § 1973gg-4(a)(1). It likewise requires "[a]cceptance of completed voter registration application forms" at state and local government offices, which must be transmitted "to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4)(iii). The statute doesn't obviously prohibit supplemental state requirements, and both preemptive and non-preemptive constructions of "accept" and "use" are plausible. The prior panel's construction thus easily passes the *Chevron* test.

The majority believes that, by requiring states to "accept and use" the federal form "for the registration of voters in elections for Federal office," 42 U.S.C. § 1973gg-4(a)(1), the NVRA precludes states from imposing additional requirements. Maj. at 17654, 17665. But neither "accept" nor "use" has such a preclusive meaning; it's entirely possible to accept and use something for a particular purpose, yet not have it be sufficient to satisfy that purpose. Just go to any liquor store that takes personal checks: They will happily accept and use your check, but only after you provide ID showing that you're authorized to write it. A minute's thought comes up with endless such

examples: passport and visa; car registration and proof of insurance; boarding pass and picture ID; eggs and ham. Those who accept and use the former often also require the latter.

The majority's contention that "accept and use" must be read preclusively "[i]n the context of the NVRA," or "under an Elections Clause framework," Maj. at 17665, is unconvincing because its understanding of "use" conflicts with that word's plain English meaning. As the Supreme Court has observed,

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990). Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" *Astor v. Merritt*, 111 U.S. 202, 213 (1884).

Smith v. United States, 508 U.S. 223, 228-29 (1993) (alterations in original). To "use" an object is simply to derive service from or utilize it. The NVRA doesn't say that states must treat the federal form as a complete application. It might preclude a state from requiring an applicant to provide yet again the information that is already on the federal form, but that's

not the case here. There's no question that Arizona accepts and uses the federal form for the information contained in it. Arizona only asks for proof of citizenship *in addition* to the form in order to complete the registration process.

Nor is the "accept and use" requirement necessarily converted into a broad preemption provision by the NVRA's general statement that "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office." 42 U.S.C. § 1973gg-2(a); *see* Maj. at 17654. That provision merely requires states to implement the NVRA regardless of any contrary legal authority. It doesn't alter the substantive scope of the statute.

The *only* thing the NVRA expressly prohibits states from requiring is "notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). The inclusion of a specific prohibition is a strong indication that other prohibitions weren't intended. *See United States v. Cabaccang*, 332 F.3d 622, 630 (9th Cir. 2003); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995).

Moreover, the NVRA expressly authorizes states to require "such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). This provision can plausibly be read as authorizing the type of "identifying information"

that Arizona requires. The majority holds that this passage is part of a comprehensive framework preventing states from requiring proof of citizenship, but overlooks the possibility that such proof may be "necessary to enable" Arizona to assess eligibility. *See* Maj. at 17652-53.

Other states also require supplemental information and the current National Voter Registration Form available at http://www.eac.gov/assets/1/page/NationalMailVoterRegistrationForm-English.pdf ("Registration Form") seamlessly accommodates them. The current form includes a box labeled "ID Number" that directs applicants to "[s]ee item 6 in the instructions for your state." Item 6, in turn, catalogs the state-by-state requirements each applicant must satisfy before the state will "accept and use" the federal form. Just like Arizona, many states require applicants to include proof of eligibility. In Alabama, "[y]our social security number is requested." Registration Form at 3. Connecticut requires a "Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number." *Id.* at 5. Hawaii tells applicants that "[y]our full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application." *Id.* at 7. There's more, but you get the idea. The majority's reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona.

The simple truth is that *nothing* in the NVRA clearly supersedes Arizona's supplemental registration

requirements. To get its way, the majority invents a broad rule of same-subject-matter preemption, arguing that the NVRA "addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections," such that its "comprehensive regulation" of the voter registration procedure "clearly subsumes Proposition 200's additional documentary requirement." Maj. at 17652-53. But, as the majority acknowledges earlier in its opinion, the question under the Elections Clause isn't whether the two laws address "the same topic," but whether Arizona's law "complements" rather than conflicts with "the congressional procedural scheme." Maj. at 17643 (citing *Ex parte Siebold*, 100 U.S. 371, 384 (1879)); *see also Foster v. Love*, 522 U.S. 67, 74 (1997) (state's election law is preempted "to [the] extent [that] it conflicts with federal law"). There's no conflict based on the text of the statutes. Arizona gladly accepts and uses the federal form, it just asks that voters also provide some proof of citizenship.

Had Congress meant to enact a comprehensive code of voter registration, it could have said so in the NVRA, but it didn't. Congress may have had the more modest goal of balancing ease of registration against each state's interest in protecting its voting system. Had Congress explicitly prohibited states from imposing additional requirements, then we could plausibly conclude that *Gonzalez I* is clearly wrong. But it didn't, and therefore the majority has no authority

under the law of the case doctrine to "depart from [the] prior decision." *Jeffries V*, 114 F.3d at 1493.

C.

The majority offers several of its own reasons for why the NVRA preempts Arizona's law. "If this court were considering the issue for the first time, [these] arguments might well deserve closer consideration." *Leslie Salt*, 55 F.3d at 1395. But "at this point in the proceedings, [we] may address the merits of [the] claims only so far as necessary to determine whether the [*Gonzalez I*] court was clearly wrong." *Id.* at 1394. None of the majority's reasons meet this exacting standard.

1. The majority claims that "allowing states to impose their own requirements for federal voter registration . . . would nullify the NVRA's procedure for soliciting state input, and aggrandize the states' role in direct contravention of the lines of authority prescribed by Section 7." Maj. at 17654. But Congress never granted much authority to the Election Assistance Commission. The Commission can't write many regulations, 42 U.S.C. § 15329, can't enforce the NVRA or the regulations it writes, *id.* § 1973gg-9, and has no investigative powers. That's not the profile of an agency in charge of a comprehensive regulatory scheme. *Cf. CFTC v. Schor*, 478 U.S. 833, 842 (1986) (O'Connor, J.) ("Congress empowered the CFTC 'to make and promulgate such rules and regulations as . . . are reasonably necessary *to effectuate any of the*

provisions or to accomplish any of the purposes of [the CEA].'" (alteration in original)). And Section 7 of the NVRA doesn't even prescribe lines of authority; it orders the Commission to consult with the states when developing the federal form. *See id.* § 1973gg-7(a). If anything, this indicates that Congress didn't want to aggrandize the Commission's power over the states. It certainly doesn't "demonstrate a legislative intent to limit States to a purely advisory role." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584 (1987) (O'Connor, J.); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (O'Connor, J.).

Nor is the majority right to rely on the letter from the Election Assistance Commission telling Arizona that its proof-of-citizenship requirement violates the NVRA. Maj. at 17654. We don't give deference to administrative agencies on the question of preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1200-01 (2009) ("In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption."). Even if we did, we wouldn't defer in this case, because an informal letter clearly lacks "the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Determining whether the NVRA preempts Arizona's proof-of-citizenship requirement begins and ends with the statute.

For the same reason, the majority's claims that states shouldn't be able to make an "end-run around

the [Election Assistance Commission]'s consultative process," Maj. at 17665, and that allowing states to supplement the federal form "would make the [Commission's] procedure for consultation . . . an empty exercise," *id.* at 17665, beg the question of whether the Commission can bind the states. Congress may have intended to grant states the power to supplement federal rules despite the Commission's objection. *Cf. Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2717 (2009) (states can enforce state fair-lending laws that OCC tried to preempt). If Congress intended to give states this power to disagree, then Arizona hasn't made an end-run at all.

2. The majority relies on the fact that the NVRA "addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections." Maj. at 17652. But the NVRA's text never states that it's the exclusive authority on this issue, or that the federal form must be "a fully sufficient means of registering to vote in federal elections." Maj. at 17665. It's perfectly plausible that the NVRA would have set the minimum information states must require, prohibited one specific type of requirement (formal authentication) and established a consultative process for developing a national form. Such broad, flexible guidance is far from a definitive regulatory scheme. Moreover, if the statute permits zero deviation from the federal form, why permit states to develop their own forms at all?

The only development needed would be photocopying the federal form.

Relatedly, the majority claims that because the NVRA prohibits requiring "notarization or other formal authentication," 42 U.S.C. § 1973gg-7(b)(3), Congress must have intended to prohibit states from imposing *any* supplemental requirements. Maj. at 17653. But Congress doesn't disguise general proscriptions of everything as specific proscriptions of one narrow thing. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . [doesn't] hide elephants in mouse-holes."). Nor would permitting Arizona to require proof of citizenship free it to violate the NVRA's ban on requiring formal notarization. Maj. at 17654. Refusing to enforce an *unwritten* ban hardly weakens the force of an *express* prohibition.

3. The majority devotes much time to making the case that "the thrust of the NVRA is to increase federal voter registration by streamlining the registration process." Maj. at 17651; *see id.* at 17644-45. It spends endless pages reviewing the history of voting laws, *id.* at 17644-46, discussing congressional hearings on the general problem of voter participation, *id.* at 17646, and reviewing the many operative parts of the NVRA, Maj. at 17646-52. But the majority's lengthy disquisition on history and purpose only highlights the absence of *any* textual support for its conclusion that Congress meant to increase voter registration by prohibiting state-imposed supplemental requirements. To the extent we rely on purpose at all,

we should focus on the purposes codified in the statute rather than our guesses based on reading the tea leaves of history and context. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

> The NVRA's four purposes are:
>
> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b) (emphasis added). Congress thus told us that it was concerned with maximizing the registration of "eligible" voters, in addition "to protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." *Id.* *None* of these purposes is served when individuals who are not citizens register to vote. *See John v. United States*, 247 F.3d 1032, 1036-37 (9th Cir. 2001) ("We must not 'interpret federal statutes to negate their own stated purposes.'"). The majority never explains why a statute enacted to "protect the integrity of the electoral process" and "ensure" that voter rolls are "accurate" must preclude

states from confirming that those who wish to register are, in fact, eligible to vote.

* * *

The majority distorts two major areas of law before it even reaches the merits. It creates an unprecedented exception to our law of the circuit rule, trampling underfoot a newly minted en banc opinion. The majority also makes a mess of the law of the case analysis by taking issue with a prior panel's *reasoning*, not its conclusion. And, as to the merits, the panel comes nowhere close to proving that *Gonzalez I*'s interpretation of the National Voter Registration Act was wrong, much less clearly wrong. Few panels are able to upset quite so many apple carts all at once. Count me out.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT;

No. 08-17094

D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

ORDER

(Filed Apr. 27, 2011)

VALLE DEL SOL;
PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA;
KEN BENNETT, in his official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES,

Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE

No. 08-17115

D.C. No. 2:06-cv-01268-ROS

FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT, in his official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; PATTY HANSEN, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election

Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ,; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County

Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder, KEN BENNETT,

Defendants-Appellees,

No. 08-17094
D.C. Nos.
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06-cv-01575-PHX-EHC

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; Patty Hansen, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder;

JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

No. 08-17115
D.C. No.
2:06-cv-01268-ROS
OPINION

Appeals from the United States District Court
for the District of Arizona
Roslyn O. Silver, Chief District Judge, Presiding

Argued and Submitted
June 21, 2011 – Pasadena, California

Filed April 17, 2012

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Pamela Ann Rymer, Susan P. Graber, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Sandra S. Ikuta, N. Randy Smith, and Mary H. Murguia, Circuit Judges.[1]

Opinion by Judge Ikuta;
Concurrence by Chief Judge Kozinski;
Concurrence by Judge Berzon;
Partial Concurrence and Partial Dissent by Judge Pregerson; Partial Concurrence and Partial Dissent by Judge Rawlinson

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COUNSEL

Nina Perales, Esq. (argued), Mexican American Legal Defense and Educational Fund, San Antonio, Texas, for plaintiffs-appellants Jesus Gonzalez, et al.

Jon M. Greenbaum, Esq. (argued), Robert A. Kengle, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., David J. Bodney, Esq., Steptoe & Johnson, LLP, Phoenix, AZ, David B. Rosenbaum, Esq., Thomas L. Hudson, Esq., Osborn Maledon, P.A., Phoenix, AZ, Joe P. Sparks, Esq., The Sparks Law Firm, Scottsdale, Arizona, Daniel B. Kohrman, Esq., AARP, Washington, D.C., for plaintiffs-appellants The Inter Tribal Council of Arizona, et al.

Samuel R. Bagenstos (argued), DOJ, Washington, D.C., for amicus curiae United States.

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[1] Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion.

Thomas C. Horne (argued), Attorney General, Phoenix, Arizona, Mary O'Grady, Solicitor General, Phoenix, Arizona, for defendant-appellee Ken Bennett.

OPINION

IKUTA, Circuit Judge:

Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote, *see* Ariz. Rev. Stat. § 16-166(F) (the "registration provision"), and requires registered voters to show identification to cast a ballot at the polls, *see* Ariz. Rev. Stat. § 16-579(A) (the "polling place provision"). This appeal raises the questions whether Proposition 200 violates § 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973, is unconstitutional under the Fourteenth or Twenty-fourth Amendments to the Constitution, or is void as inconsistent with the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.* We uphold Proposition 200's requirement that voters show identification at the polling place, but conclude that the NVRA supersedes Proposition 200's registration provision as that provision is applied to applicants using the National Mail Voter Registration Form (the "Federal Form") to register to vote in federal elections.

I

On November 2, 2004, Arizona voters passed a state initiative, Proposition 200, which (upon

proclamation of the Governor) enacted various revisions to the state's election laws. As explained in more detail below, Proposition 200's registration provision amended Arizona's voter registration procedures to require the County Recorder to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Proposition 200's polling place provision amended Arizona's election day procedures to require voters to present specified forms of identification at the polls. *See id.* § 16-579(A).

Shortly after Proposition 200's passage, a number of plaintiffs filed lawsuits against Arizona[2] to enjoin these changes. Two groups of plaintiffs are relevant to this appeal: the Gonzalez plaintiffs (Gonzalez) and the Inter Tribal Council of Arizona plaintiffs (ITCA).[3]

The district court consolidated the various complaints. After the district court denied the plaintiffs' motion for a preliminary injunction, Gonzalez and

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[2] We refer to the defendants collectively as "Arizona," even though Arizona county recorders were also named as individual defendants.

[3] Jesus Gonzalez represented one group of plaintiffs, which consisted of individual Arizona residents and organizational plaintiffs. The Inter Tribal Council of Arizona, a non-profit organization of twenty Arizona tribes, represented another group of plaintiffs, which included the Hopi Tribe, Representative Steve Gallardo from the Arizona State House of Representatives, the League of Women Voters of Arizona, the League of United Latin American Citizens, the Arizona Advocacy Network, and People For the American Way Foundation.

ITCA appealed. *See Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1046 (9th Cir. 2007). Because the briefing schedule for the appeal extended beyond the 2006 election, Gonzalez and ITCA moved for an emergency interlocutory injunction (which would prevent the implementation of Proposition 200 pending the disposition of the appeal of the district court's denial of a preliminary injunction), which we granted. *See id.* After Arizona petitioned for certiorari, the Supreme Court vacated the emergency injunction and remanded the case to this court for a determination of the merits of the appeal. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (per curiam).

On remand, Gonzalez and ITCA pursued their claim for preliminary injunctive relief only with respect to Proposition 200's registration requirement. *Gonzalez I*, 485 F.3d at 1048. The panel in *Gonzalez I* affirmed the district court's denial of the preliminary injunction, holding that Proposition 200's registration provision was not an unconstitutional poll tax and was not superseded by the NVRA. *See id.* at 1049, 1050-51.

On remand, the district court held that Proposition 200's polling place provision was not a poll tax under the Twenty-fourth Amendment and its registration provision did not conflict with the NVRA, and granted summary judgment to Arizona on these claims. After trial, the district court resolved all other claims in favor of Arizona, holding that Proposition 200 did not violate § 2 of the VRA or the Equal Protection Clause of the Fourteenth Amendment and did

not constitute a poll tax under the Fourteenth Amendment.

Gonzalez and ITCA appealed the district court's rulings on the NVRA and Twenty-fourth Amendment claims. In addition, ITCA challenged the court's determination that Proposition 200 was not a poll tax under the Fourteenth Amendment, and Gonzalez challenged the court's determinations on the Voting Rights Act and Equal Protection Clause claims. A three-judge panel affirmed in part and reversed in part, holding that Proposition 200's polling place provision did not violate the VRA or the Fourteenth and Twenty-fourth Amendments, but that Proposition 200's registration provision was superseded by the NVRA. *Gonzalez v. Arizona* (*Gonzalez II*), 624 F.3d 1162 (9th Cir. 2010). In deciding Gonzalez and ITCA's challenge to the registration provision, the panel overruled the contrary holding of *Gonzalez I* on the ground that an exception to the law of the case rule applied.[4] *See id.* at 1185-91. A majority of the active judges of the court voted to rehear the case en banc.

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[4] Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. *See Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc). We have recognized exceptions to the law of the case doctrine, however, where "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (footnote omitted) (quoting *Caldwell v. Unified Capital*

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II

We first consider Proposition 200's registration provision. *See* Ariz. Rev. Stat. § 16-166(F). Gonzalez and ITCA contend that this provision is preempted by

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Corp. (*In re Rainbow Magazine, Inc.*), 77 F.3d 278, 281 (9th Cir. 1996)) (internal quotation marks omitted). Some of our cases indicated that a three-judge panel could rely on these exceptions to overrule the law of an earlier published opinion, so long as no subsequent panel had yet relied on it. *See id.* at 1492-93; *see also Mendenhall v. NTSB*, 213 F.3d 464, 469 n.3 (9th Cir. 2000); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 786-88 (9th Cir. 2000).

We now hold that the exceptions to the law of the case doctrine are not exceptions to our general "law of the circuit" rule, i.e., the rule that a published decision of this court constitutes binding authority which "must be followed unless and until overruled by a body competent to do so," *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). To the extent that our prior cases suggested otherwise, *see Jeffries*, 114 F.3d at 1492-93; *Mendenhall*, 213 F.3d at 469 n.3; *Tahoe-Sierra Pres. Council, Inc.*, 216 F.3d at 786-88, they are overruled. This determination, however, does not affect other recognized exceptions to the law of the circuit rule. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that where "the relevant court of last resort" has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," then "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

the NVRA under both the Supremacy Clause and the Elections Clause of the U.S. Constitution. In response, Arizona relies on the Supremacy Clause's "presumption against preemption," *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), to argue that the NVRA neither expressly nor impliedly preempts state voter registration laws. Before addressing the parties' arguments, we first consider whether the framework of the Elections Clause or the Supremacy Clause properly governs this question.

A

The Elections Clause establishes a unique relationship between the state and federal governments. It provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. In a nutshell, state governments are given the initial responsibility for regulating the mechanics of federal elections, but Congress is given the authority to "make or alter" the states' regulations.

The history of the Elections Clause reveals the reasoning behind its unusual delegation of power. Under the Articles of Confederation, the states had

full authority to maintain, appoint, or recall congressional delegates.[5] At the Philadelphia Convention, delegates expressed concern that, if left unfettered, states could use this power to frustrate the creation of the national government, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995), most obviously by neglecting to hold federal elections. The Framers decided that Congress should be given the authority to oversee the states' procedures related to national elections as a safeguard against potential state abuse. *See id.*; *see also* The Federalist No. 59, at 168 (Alexander Hamilton) (Ron P. Fairfield ed., 2d ed. 1981) (explaining that "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Over the protest of some Southern delegates,[6] the Framers approved language

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[5] *See* Articles of Confederation of 1781, art. V ("[D]elegates shall be annually appointed in such manner as the legislature of each State shall direct . . . with a power reserved to each state, to recall its delegates. . . .").

[6] South Carolinian delegates Charles Pinckney and John Rutledge moved to exclude the language giving Congress this supervisory power over the states. 5 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787.* Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution 401 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1901) [hereinafter Elliot's Debates]. "The states, they contended, could and must be relied on" to

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giving Congress power to "make or alter" the states' regulations. *See* 5 Elliot's Debates 401-02 (statement of James Madison). As modified to give Congress this supervisory power, this language became the Elections Clause.[7]

Thus, the Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. The clause gives states the default authority to prescribe the "Times, Places and Manner" of conducting federal elections. Nevertheless, because Congress "may at any time by Law make or alter" the regulations passed by the state, power over federal election procedures is ultimately "committed to the exclusive control of Congress." *Colegrove v. Green*, 328 U.S. 549, 554 (1946).[8] While Congress may not always choose to

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regulate legislative appointments. *Id.*; *see also Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004).

[7] Alexander Hamilton described the need for congressional oversight of the states as follows:

> [The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

The Federalist No. 59, at 168.

[8] The Court has generally construed Congress's authority under the Elections Clause expansively. *See, e.g., United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the

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exercise this power, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold,* 100 U.S. 371, 384 (1879); *see also Foster v. Love,* 522 U.S. 67, 69 (1997) (stating that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices" (citation omitted)). Moreover, we have held that the Elections Clause requires states to implement Congress's superseding regulations without compensation from the federal government. *See Voting Rights Coal. v. Wilson,* 60 F.3d 1411, 1415 (9th Cir. 1995). Thus, unlike virtually all other provisions of the Constitution, the Elections Clause gives Congress the power to "conscript state agencies to carry out" federal mandates. *Id.* In sum, a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out

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right of an eligible voter to cast ballot and have ballot counted); *Ex Parte Coy,* 127 U.S. 731, 753-54 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke,* 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections).

whatever procedures Congress requires. *See Foster*, 522 U.S. at 69.

As should be clear from this overview, the Elections Clause operates quite differently from the Supremacy Clause. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under our system of dual sovereignty, courts deciding whether a particular state law is preempted under the Supremacy Clause must strive to maintain the "delicate balance" between the States and the Federal Government, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see Medtronic*, 518 U.S. at 485, especially when Congress is regulating in an area "traditionally occupied by the States," *United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation marks omitted); *see also Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). The Supreme Court has crafted special guidelines to assist courts in striking this balance. First, courts applying the Supremacy Clause are to begin with a presumption against preemption. *E.g.*, *Altria Grp. v. Good*, 555 U.S. 70, 77 (2008); *Medtronic*, 518 U.S. at 485. This principle applies because, as the Court has recently noted, "respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly preempt state-law causes of action." *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotation marks omitted). Second, the Court has adopted a "plain

statement rule," holding that a federal statute preempts a state law only when it is the "clear and manifest" purpose of Congress to do so. *Gregory*, 501 U.S. at 461 (internal quotation marks omitted). Only where the state and federal laws cannot be reconciled do courts hold that Congress's enactments must prevail. *See, e.g., Altria*, 555 U.S. at 76-77.

In contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections. *See U.S. Term Limits*, 514 U.S. at 804-05. As the Supreme Court has explained, because federal elections did not exist prior to the formation of the federal government, the states' sole authority to regulate such elections "aris[es] from the Constitution itself," *id.* at 805. Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a "delicate balance" between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance. For this reason, the "presumption against preemption" and "plain statement rule" that guide Supremacy Clause analysis are not transferable to the Elections Clause context. *See Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (declining to apply Supremacy Clause preemption principles in analyzing the preemptive effect of the NVRA). Indeed, the Supreme Court has suggested as much.

In *Foster*, the Supreme Court upheld the Fifth Circuit's determination that a state election law was voided by a federal election law; however, instead of adopting the Fifth Circuit's Supremacy Clause analysis, the Court analyzed the claim under the Elections Clause, without ever mentioning a presumption against preemption or plain statement rule. *See Foster*, 522 U.S. 67, *aff'g* 90 F.3d 1026 (5th Cir. 1996). In fact, our survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles. Because the Elections Clause empowered Congress to enact the NVRA, *see Wilson*, 60 F.3d at 1413-14, the preemption analysis under that Clause applies here.

B

The Supreme Court first explained the principles of Elections Clause preemption in *Siebold*, 100 U.S. 371. In that case, the Court likened the relationship between laws passed by state legislatures and those enacted by Congress under the Elections Clause to "prior and subsequent enactments of the same legislature." *Id.* at 384. "The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress." *Id.* at 388. Just as a subsequent legislature is not required to make an "entirely new set" of laws when modifying those of a prior legislature, neither is Congress required to wholly take over the regulation of federal election procedures when choosing to "make or alter" certain

of the states' rules. *Id.* at 384. There is no "intrinsic difficulty in such cooperation" between the state and national legislatures because the two governments do not possess an "equality of jurisdiction" with respect to federal elections. *Id.* at 392. In all instances, "the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." *Id.* at 397.

Over a century later, the Supreme Court clarified what constitutes a conflict under an Elections Clause analysis. *See Foster,* 522 U.S. 67. *Foster* considered whether a congressional enactment superseded a Louisiana statute regulating the same federal election procedure. *Id.* at 68-69. Specifically, federal law set the date for congressional elections as the Tuesday after the first Monday in November. *Id.* at 68. A Louisiana statute established an open primary in October for the offices of United States Senator and Representative. *Id.* at 70. Only if the open primary failed to result in a majority candidate would a run off election between the top two candidates be held on Congress's specified election day. *Id.* In response to a challenge by Louisiana voters, the Court unanimously held that the state and federal acts conflicted and thus that the federal statute superseded the Louisiana law. *Id.* at 74.

The Court rejected the state's claim that its statute and the federal enactment could be construed harmoniously. *Id.* at 72-73. Louisiana asserted that "the open primary system concern[ed] only the 'manner' of electing federal officials, not the 'time' at which

the elections will take place." *Id.* at 72. The Court discarded the state's "attempt to draw this time-manner line" as "merely wordplay" and an "imaginative characterization" of the statutes. *Id.* at 72-73. Building upon the principles from *Siebold,* the Court declined to adopt a strained interpretation of the statutes to reconcile a potential disagreement.[9] *See id.* Rather, the Court emphasized Congress's plenary authority not only to supplant state rules but to conscript states to carry out federal enactments under the Elections Clause, and found it enough that, under a natural reading, the state and federal enactments addressed the same procedures and were in conflict. *Id.* Refusing to pare the statute "down to the definitional bone," the Court held that the state enactment was void. *Id.* at 72, 74.

Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace

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[9] The dissent's claim that in *Foster* there was a "blatant conflict" between the state and federal election laws, dis. op. at 4213, is incorrect. Rather, the petitioners in *Foster* proffered a reading of the state and federal statutes that at least technically avoided a conflict. *See Foster,* 522 U.S. at 72 (arguing that "because Louisiana law provides for a 'general election' on federal election day in those unusual instances when one is needed, the open primary system concerns only the 'manner' of electing federal officials, not the 'time' at which the elections will take place"). The Court rejected this reading as "merely wordplay." *Id.* The dissent provides a similarly strained reading of the NVRA and Proposition 200, *see* dis. op. at 4203-04, 4206-07 which likewise falls short, *see infra* at 4138-43.

a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold*, 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster*, 522 U.S. at 74; *see id.* at 72-73. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

C

Before applying this Elections Clause analysis here, we must understand the scope and application of the federal and state statutes at issue, namely the NVRA and Proposition 200's registration provision.

The NVRA prescribes three methods for registering voters for federal elections. 42 U.S.C. § 1973gg-2(a). These methods are: (1) "by application made simultaneously with an application for a motor

vehicle driver's license," *id.* § 1973gg-2(a)(1);[10] (2) "by mail application" using the Federal Form prescribed by the Election Assistance Commission (EAC),[11] *id.* §§ 1973gg-2(a)(2), 1973gg-4; and (3) "by application in person" at sites designated in accordance with state law or state voter registration agencies, *id.* § 1973gg-2(a)(3). States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law" and "in addition to any other method of voter registration provided for under State law." *Id.* § 1973gg-2(a).[12]

In connection with prescribing these three methods of voter registration, the NVRA mandates the creation of two new voter registration applications. First, the NVRA requires states to create a combined driver's license and voter registration application

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[10] Under this method, any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). This provision earned the statute its informal name: the "Motor Voter Law."

[11] The responsibilities of the EAC were formerly held by the Federal Election Commission (FEC). When Congress passed the Help America Vote Act or 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, it created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532. In this opinion, we refer to both entities as the EAC.

[12] States that do not require registration to vote or allow election-day registration at polling places are exempt from the NVRA. *See* § 1973gg-2(b). These states are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. *See* 75 Fed. Reg. 47,729-01, 47,730 (Aug. 9, 2010).

form (the "Motor Voter Form") pursuant to certain criteria set out in the statute. *See id.* § 1973gg-3. The NVRA also requires the EAC to create the Federal Form, a nationally uniform voter application that applicants can use to register by mail and in person at designated locations. *See id.* §§ 1973gg-4, 1973gg-7(a)(2). In addition, states may (but are not required to) create their own state mail voter registration forms for federal elections (the "State Form"), so long as these forms meet certain criteria in the NVRA. *See id.* § 1973gg-4(a)(2).

The NVRA sets out a broad framework for the contents of the Federal Form, including specifying certain items that must be included on the form, along with other items that cannot be. *See id.* § 1973gg-7(b). Among other things, *id.* § 1973gg-7(b) provides that the Federal Form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 1973gg-7(b)(1). Further, the Federal Form must include a statement specifying "each eligibility requirement (including citizenship)" for voting along with an "attestation that the applicant meets each such requirement," *id.* § 1973gg-7(b)(2)(A)-(B), and must require "the signature of the applicant, under penalty of perjury," *id.* § 1973gg-7(b)(2)(C). In addition, the NVRA provides that the Federal Form

cannot include "any requirement for notarization or other formal authentication," *id.* § 1973gg-7(b)(3).[13]

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[13] In full, section 1973-gg7(b) states that the Federal Form

> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (2) shall include a statement that –
>
> > (A) specifies each eligibility requirement (including citizenship);
> >
> > (B) contains an attestation that the applicant meets each such requirement; and
> >
> > (C) requires the signature of the applicant, under penalty of perjury;
>
> (3) may not include any requirement for notarization or other formal authentication; and
>
> (4) shall include, in print that is identical to that used in the attestation portion of the application –
>
> > (i) the voter eligibility requirements and penalties for false applications set forth in § 1973gg-6(a)(5);
> >
> > (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and
> >
> > (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Id. § 1973gg-7(b).

The NVRA directs the EAC, in consultation with "the chief election officers of the States," to develop the Federal Form in a manner consistent with these broad guidelines. *Id.* § 1973gg-7(a)(2). The EAC discharged this statutory requirement by designing a Federal Form that met the criteria set forth in section 1973gg-7(b). *See* 59 Fed. Reg. 32,311-01 (June 23, 1994), codified at 11 C.F.R., pt. 9428. As designed by the EAC (and subsequently modified by HAVA, 42 U.S.C. §§ 15301 *et seq.*), the Federal Form is a postcard.[14] *See* 11 C.F.R. § 9428.5. The top of the form asks "Are you a citizen of the United States of America?" and "Will you be 18 years old on or before election day?" with boxes for the applicant to check yes or no.[15] Applicants who check "no" to either of these questions are instructed not to complete the form. If the applicant checks "yes" to both questions, the form then requests the applicant's name, address, date of birth, telephone number (optional), choice of party,[16] race or ethnic group,[17] and "ID number."[18] It also

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[14] The Federal Form is set forth in Appendix A.

[15] These two questions and the associated instructions were added to the Federal Form by HAVA. 42 U.S.C. § 15483(b)(4)(A)(i)-(ii).

[16] "Choice of party" is required in some states for voters who wish to participate in closed primaries. It is not required to register to vote in general elections. *See* 59 Fed. Reg. at 32,314.

[17] This box was included on the Federal Form to assist certain states in their data collection efforts pursuant to § 5 of the VRA. *Id.* at 32,315-16.

[18] The "ID number" is used for "election administration purposes." 11 C.F.R. § 9428.4(a)(6), *see* 59 Fed. Reg. at 32,314

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requires the applicant to attest (with a signature or mark) that he or she is a U.S. citizen, meets his or her state's voting eligibility requirements, and has provided information that is "true to the best of [his or her] knowledge under penalty of perjury." No other proof of U.S. citizenship is required. The Federal Form postcard may be dropped into the mail or delivered in person to one of the designated offices.

As noted above, in addition to mandating the creation and use of the Federal Form, the NVRA allows states to develop and use an optional State Form for registering voters for federal elections. *See* 42 U.S.C. § 1973gg-4(a)(2). If a state chooses to create a State Form, that form must conform to the broad framework for the contents of the Federal Form set forth in section 1973gg-7(b). *See id.* Arizona chose to create a State Form[19] that is similar to the Federal Form but requires that first-time voters and persons who have moved between Arizona counties "also include proof of citizenship or the form will be rejected." According to the State Form instructions, an

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(explaining that ID numbers "are not necessary for determining the eligibility of the applicant," but rather are for assisting the states in administering the registration process). The Federal Form's instruction booklet provides state-specific instructions for the "ID number" box: for Arizona, applicants must provide a driver's license, non-operating identification license number, the last four digits of a social security number, or write "None." These instructions are consistent with Arizona's election administration obligations under HAVA. *See infra* at pp. 401-02.

[19] The Arizona State Form is set forth in Appendix B.

applicant can satisfy this proof of citizenship requirement by writing in a designated box on the State Form the number of the applicant's Arizona driver's license or nonoperating identification license issued after October 1, 1996,[20] alien registration number, or specified tribal identification number (as relevant). If the applicant lacks such a number, the applicant must include a photocopy of one of the acceptable documents listed on the State Form (such as a birth certificate, U.S. passport, tribal document, or the like) along with the form itself.

While the NVRA permits states to use their own State Forms to register voters for federal elections, the NVRA still requires every state to "accept and use" the Federal Form developed by the EAC. *See id.* § 1973gg-4(a)(2) ("*In addition to* accepting and using [the Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office." (emphasis added)). In this way, the NVRA guarantees that an applicant in any state seeking to register to vote in federal elections may do so using the Federal Form.

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[20] Arizona started requiring applicants to provide documentation of their lawful status as U.S. residents as a condition of receiving a driver's license or non-operating identification license after October 1, 1996.

D

Having reviewed the relevant provisions of the NVRA, we now turn to Proposition 200's registration provision, which states: "The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). The statute defines satisfactory evidence of U.S. citizenship to include the number of the applicant's driver's license or nonoperating identification license, certain numbers associated with Native American tribal status, the number of a certificate of naturalization (or the in-person presentation of naturalization documents), or a legible photocopy of a U.S. birth certificate or passport.[21] *See id.*

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[21] Section 16-166(F) provides the following list of approved identification documents:

> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
>
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or

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By its terms, this proof of citizenship requirement applies to the Federal Form as well as to Arizona's State Form.[22] In other words, Proposition 200's registration provision directs Arizona county recorders to reject every Federal Form that is submitted without the specified evidence of citizenship. According to the Arizona Election Procedures Manual, which has the force and effect of law, *see* Ariz. Rev. Stat. § 16-452, if a rejected applicant wants to make a second attempt to provide evidence of citizenship, he

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presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

[22] Proposition 200 also amended state law to require Arizona's State Form to "contain . . . [a] statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached." Ariz. Rev. Stat. § 16-152(A)(23). Because this provision does not affect the Federal Form, we do not consider it here.

or she must submit an entirely new voter registration form in order to do so.[23]

E

We now turn to Gonzalez and ITCA's contention that the NVRA's requirement that states "accept and use" the Federal Form supersedes Proposition 200's registration provision as applied to applicants using the Federal Form.[24]

In assessing this argument, we apply the Elections Clause framework we derived from *Siebold* and *Foster* and consider the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures. With respect to mail voter registration, the NVRA provides that "[e]ach State shall accept and use" the Federal Form "for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1). By contrast,

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[23] The manual instructs county recorders:

> If [a voter registration] form is not accompanied by proper proof of citizenship, the voter registration form is not valid and either will not be entered into the system or if it was entered into the system, the record shall be canceled. If the registrant subsequently provides proof of citizenship, it must be accompanied by a new voter registration form and a new registration date.

Arizona Secretary of State Elections Procedures Manual (Oct. 2007).

[24] Gonzalez and ITCA do not challenge Proposition 200's registration provision as applied to Arizona's State Form.

Proposition 200's registration provision directs county recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," as defined by Arizona law. Ariz. Rev. Stat. § 16-166(F). When read together, the federal and state enactments treat the same subject matter, namely, the procedure for registering by mail to vote in federal elections using the Federal Form, but they do not operate harmoniously. In fact, these procedures are seriously out of tune with each other in several ways.

First, the NVRA requires a county recorder to accept and use the Federal Form to register voters for federal elections, whereas the registration provision requires the same county recorder to reject the Federal Form as insufficient for voter registration if the form does not include proof of U.S. citizenship. Arizona attempts to harmonize these procedures, arguing that because the county recorder will accept the Federal Form for voter registration so long as it includes satisfactory evidence of citizenship, the county recorder is in fact complying with the NVRA's mandate to "accept and use" the Federal Form, per 42 U.S.C. § 1973gg-4(a)(1). Rejection of the Federal Form in certain circumstances, Arizona argues, does not in itself mean that the state is failing to accept and use the form. Indeed, Arizona asserts, Congress must have contemplated that some applicants using the Federal Form would be rejected, because the NVRA directs states to notify "each applicant of the

disposition of [his or her] application." *Id.* § 1973gg-6(a)(2).

We disagree. Although Arizona has offered a creative interpretation of the state and federal statutes in an effort to avoid a direct conflict, we do not strain to reconcile a state's federal election regulations with those of Congress, but consider whether the state and federal procedures operate harmoniously when read together naturally. *See Foster*, 522 U.S. at 72-74; *Siebold*, 100 U.S. at 384. Here, under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute "accepting and using" the Federal Form. Arizona cannot cast doubt on this conclusion by pointing out that the NVRA allows states to reject applicants who fail to demonstrate their eligibility pursuant to the Federal Form. Congress clearly anticipated that states would reject applicants whose responses to the Federal Form indicate they are too young to vote, do not live within the state, or have not attested to being U.S. citizens. Indeed, the NVRA instructs the EAC to request information on the Federal Form for the precise purpose of "enabl[ing] the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). Thus, a state that assesses an applicant's eligibility based on the information requested on the Federal Form is "accepting and using" the form in exactly the way it was meant to be used. In contrast, Proposition 200's registration provision directs county recorders to assess an

applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose.

The dissent likewise attempts to justify Arizona's rejection of the Federal Form, but rests its arguments almost exclusively on the fact that § 1973gg-4(a)(2) allows states to develop and use a State Form, which may include requirements that are not included in the Federal Form. *See* dis. op. at 4200-03, 4204-06. According to the dissent, because states may impose additional proof-of-citizenship requirements on applicants using the State Form, it necessarily follows that states may impose the same proof-of-citizenship requirements on applicants using the Federal Form; that is, that they may reject Federal Forms that do not include the additional proof of citizenship. *See* dis. op. at 4203-06. But there is no logical connection between the dissent's premise and its conclusion, which is contrary to the text of the statute. The NVRA clearly requires states to accept and use the Federal Form (as designed by the EAC) "[i]n addition to" the State Form.

The NVRA's State Form provision, § 1973gg-4(a)(2), merely gives a state more options. Congress could have required all states to use *only* the Federal Form, as designed by the EAC, for federal elections. If Congress had done so, then states could not use their

state registration forms to register applicants for federal elections. Instead, Congress allowed States to use their state registration forms to register applicants for both state and federal elections (provided the state form complies with § 1973gg-7(b)).[25] But states cannot reject applicants who register for federal elections who use the Federal Form. There is nothing illogical or inconsistent about requiring states to accept the federal registration form in addition to their own state form.

In order to avoid the clear import of the NVRA's text, the dissent argues that the Federal Form merely establishes the default minimum or baseline registration requirements. *See* dis. op. at 4203-04, 4209. In effect, the dissent wants to replace the words "in addition to" with the words "instead of," so that "a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title" *instead of* "accepting and using" the Federal Form. We have no authority to rewrite the statute, however, and reject the dissent's interpretation as being inconsistent with the plain language. *See id.* ("*In addition to* accepting and using

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[25] The dissent therefore has it exactly backwards in asserting that, under our interpretation of § 1973gg-4(a)(2), states may not use their state registration forms to register "voters in elections for Federal office." Dis. op. at 4208. States *may* use their state registration forms to register voters in elections for federal office; they simply may not *require* registrants to use the State Form (or the equivalent of the State Form, namely, the Federal Form altered to include additional state requirements).

[the Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office." (emphasis added)).

Second, Proposition 200's registration provision clashes with the NVRA's delegation of authority to the EAC (not the states) to determine the contents of the Federal Form. *See id.* § 1973gg-7(a)(2). While states may suggest changes to the Federal Form, the EAC has the ultimate authority to adopt or reject those suggestions. *See id.* § 1973gg-7(a). Here the EAC sent Arizona a letter rejecting its proposal to modify the Federal Form to require applicants to present documentary proof of citizenship in order to register, *see infra* p. 4148 n.29, but Arizona nevertheless proceeded to impose this additional requirement on applicants using the Federal Form. Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the conflict between the state and federal procedures.[28]

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[28] Arizona argues that *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000), supports its conclusion that states may add requirements to the Federal Form, so long as the NVRA does not expressly forbid those requirements. Arizona is misreading McKay. In that case, the court rejected a prospective voter's objection to Tennessee's practice of requiring a full social security number as a precondition to successful registration, *see id.* at 754, stating that "[t]he NVRA does not specifically forbid use of social security numbers." *Id.* at 756. But this holding does

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Arizona attempts to minimize the clash between the NVRA and Proposition 200 by noting that a proof of citizenship requirement is consistent with the broad framework set out by Congress in section 1973gg-7(b); specifically, Arizona notes that the NVRA permits the Federal Form to seek such information as is necessary to "assess the eligibility of the applicant," *id.* § 1973gg-7(b)(1), and does not expressly preclude a requirement that applicants provide proof of citizenship. Further, Arizona asserts that although Congress provided that the mail voter registration form "may not include any requirement for notarization or other formal authentication," *id.* § 1973gg-7(b)(3), Arizona's demand for proof of citizenship does not amount to such a requirement. This argument misses the point. Even assuming, without deciding, that Arizona is correct in its interpretation of section 1973gg-7(b), this would mean only that the NVRA allows Arizona to include a proof of citizenship requirement on its State Form. *See id.* § 1973gg-4(a)(2) (allowing a state to "develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b)"). It would not mean that Arizona has authority to add this requirement to

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not help Arizona because the Federal Form allows states to instruct applicants to provide their full social security numbers in the "ID number" box on the Federal Form (and Tennessee's instructions do so). *See supra* p. 4135 & n.18. *McKay* therefore does not support the proposition that a state may condition registration on an applicant's provision of information that is *not* requested on the Federal Form.

the Federal Form. Congress entrusted that decision to the EAC. Once the EAC determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants and to "accept and use" it for the registration of voters.

Third, Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process. *See, e.g., Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 285 (4th Cir. 1998) ("Congress passed the NVRA . . . to make it easier to register to vote. . . ."); *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA]."). While the EAC chose to design the Federal Form as a postcard, which could be easily filled out and mailed on its own, Proposition 200's registration provision makes the Federal Form much more difficult to use. For example, nothing on the face of the Federal Form or in the state-specific instructions for Arizona indicates that some applicants may need to provide a full social security number, a tribal identification number, or an alien registration number, as Proposition 200 requires.[27] Nor does the

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[27] Because the Federal Form can be used as a mail-in postcard, the dissent's credit card analogy, *see* dis. op. at 4204, is not on point. A consumer would rightly cry foul if a merchant claimed it would "accept and use" mailed-in credit card information for a purchase, but then refused to complete the transaction because the consumer failed to include additional

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Federal Form instruct that additional documents, such as birth certificates or passports, must be provided by some applicants. Even if an applicant were aware of Arizona's requirement to provide documentary proof of citizenship with the Federal Form, the applicant would have to locate the required document, photocopy it, and enclose the photocopy with the form in an envelope for mailing. In short, much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision.

Notwithstanding these concerns, Arizona asserts that Proposition 200's registration provision imposes little additional burden on applicants, because only a small minority of applicants lack a driver's license number, tribal identification number, or alien registration number, all of which could suffice to show citizenship and can easily be written on the Federal Form. For this reason, Arizona contends, its proof of citizenship requirement is not excessively burdensome under the standard set forth in *Crawford v. Marion County Election Board*, 553 U.S. 181, 199-200 (2008) (Stevens, J., announcing the judgment of the Court). This argument misses the mark. The goal of the NVRA was to streamline the registration process

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information that the merchant had not requested. By the same token, the Federal Form does not request documentary proof of citizenship. Because a state must "accept and use" this form it cannot reject it merely because an applicant has mailed it in without including information that is not expressly required.

for all applicants; the fact that Proposition 200's registration provision only *partially* undermines this goal does not make it harmonious with the NVRA. Nor does *Crawford* provide support for Arizona's argument. In *Crawford,* the Court considered whether a polling place requirement imposed a substantial burden on the right to vote, in violation of the Fourteenth Amendment. *See id.* at 187. Even if Arizona is correct that Proposition 200's registration provision does not impose such a burden, this conclusion sheds no light on the question before us here: whether the registration provision is displaced by the NVRA under an Elections Clause analysis.

F

Because on its face the NVRA does not give states room to add their own requirements to the Federal Form, Arizona suggests that Congress's subsequent enactment of HAVA permits us to reinterpret the NVRA to allow states to impose additional requirements on applicants for voter registration. Again, we disagree, because by its terms HAVA precludes such an interpretation.

Congress enacted HAVA in response to the 2000 Presidential election and the ensuing controversial Florida recount. *See Fla. State Conference of NAACP v. Browning,* 522 F.3d 1153, 1155 (11th Cir. 2008). For the most part, the NVRA and HAVA operate in separate spheres: the NVRA regulates voter registration, whereas HAVA is concerned with updating election

technologies and other election-day issues at polling places. However, a handful of provisions in HAVA relate to the voter registration process, primarily by creating mechanisms through which states can ensure that the person who appears to cast a ballot at the polls is the same person who registered to vote. Relevant here, HAVA requires states to obtain (or assign) unique identification numbers for all registered voters: each applicant must provide his or her driver's license number or the last four digits of his or her social security number on the voter registration form, or if the applicant lacks such a number, the state must assign the applicant a number "which will serve to identify the applicant for voter registration purposes." 42 U.S.C. § 15483(a)(5)(A)(i)-(ii). In addition, states are to take steps to verify that the applicant's claimed identity matches the identification number he or she provided. *See id.* § 15483(a)(5)(A)(iii) (requiring states to "determine whether the [identification] information provided by an individual is sufficient to meet the requirements" of HAVA); *see also Crawford*, 553 U.S. at 192.

HAVA also includes language limiting its scope. It clarifies that "[t]he requirements established by [HAVA] are minimum requirements and nothing in [HAVA] shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under [HAVA] so long as such State requirements are not inconsistent with the Federal requirements under [HAVA] or any law described

in section 15545 of this title." *Id.* § 15484. Section 15545 is HAVA's savings clause: it provides that except for the changes to the NVRA specified in HAVA, "nothing in this Act may be construed to authorize or require conduct prohibited under [a number of federal laws, including the NVRA], or to supersede, restrict, or limit the application of [those federal laws]." *Id.* § 15545(a).

Arizona argues that HAVA gives it the authority to impose additional requirements on applicants using the Federal Form for two reasons. First, Arizona contends that because HAVA directs states to verify the accuracy of the driver's license or social security numbers provided on the Federal Form, *see id.* § 15483(a)(5)(A)(iii), Arizona must likewise have the authority to verify the accuracy of other information on the Federal Form, including an applicant's claim of citizenship. Second, Arizona asserts that because HAVA establishes only "minimum requirements," and authorizes states to develop "election technology and administration requirements that are more strict than [HAVA's] requirements," *id.* § 15484, HAVA gives states a green light to impose stricter requirements on voter registration.

Both of these arguments fail in light of HAVA's savings clause, which makes clear that Congress intended to preserve the NVRA except as to the specific changes it enacted in HAVA. While HAVA made a handful of changes to the NVRA, it did not add a proof of citizenship requirement to the Federal Form and did not authorize states to do so. For the

reasons explained above, an interpretation of HAVA that allows states to override the EAC's authority in designing the Federal Form would "supersede, restrict, or limit the application of" the NVRA. *Id.* § 15545(a). Because the savings clause precludes such an interpretation, we decline to adopt one. Therefore, HAVA does not provide Arizona the authorization it seeks.

G

We recognize Arizona's concern about fraudulent voter registration. Nevertheless, the Elections Clause gives Congress the last word on how this concern will be addressed in the context of federal elections. As is evidenced by one of the four articulated purposes of the NVRA, which is "to protect the integrity of the electoral process," *id.* § 1973gg(b)(3), Congress was well aware of the problem of voter fraud when it passed the act and provided for numerous fraud protections in the NVRA.[28]

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[28] These safeguards include the NVRA's requirement that the Federal Form, the State Forms, and the Motor Voter Forms contain an attestation clause that sets out the requirements for voter eligibility. *Id.* §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury, *id.* §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C), and persons who knowingly and willfully engage in fraudulent registration practices are subject to criminal penalties, *id.* § 1973gg-10(2). In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. *See id.*

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With respect to the Federal Form, Congress delegated to the EAC the decision of how to balance the need "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process," *id.* § 1973gg(b)(1), (3). The EAC struck this balance by requiring applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship. *See* 59 Fed. Reg. at 32,316 ("The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form."). Though Arizona has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context. *See ACORN v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) (rejecting Illinois's argument that because the "motor voter" component of the NVRA "opens the door to voter fraud," the state was entitled to refuse to comply with the law).

In sum, the NVRA and Proposition 200's registration provision, when interpreted naturally, do not

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§ 1973gg-4(c). Finally, section 1973gg-6 requires states to give notice to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations. *See id.* § 1973gg-6(a)(2).

operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, we must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA.[29]

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[29] We reach our conclusion based on the language and structure of the statute, and therefore do not rely on the EAC's interpretation of the NVRA or the NVRA's legislative history. While ITCA maintains that the EAC's view is entitled to some level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), Arizona argues that Congress did not delegate any authority to the EAC to interpret the NVRA, *see* 42 U.S.C. § 15329, and thus deference is not appropriate. We need not resolve this dispute, but merely note that both the EAC's view and the NVRA's legislative history are consistent with our holding. In its letter to Arizona, the EAC construed the NVRA as not permitting states to "condition acceptance of the Federal Form upon receipt of additional proof." With respect to the legislative history, the NVRA's Conference Report, which we have held is the most authoritative and reliable legislative material, *see, e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996), shows that Congress rejected an amendment to the NVRA which would have provided that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration," H.R. Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148. The conferees explained that the amendment was not "consistent with the purposes of" the NVRA and "could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.*

III

Because we hold that the NVRA supersedes Proposition 200's registration provision,[30] the remainder of our analysis focuses solely on the validity of Proposition 200's polling place provision. Proposition 200 amended section 16-579 of the Arizona Revised Statutes to require that a voter "present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector" as a prerequisite to receiving a ballot. Ariz. Rev. Stat. § 16-579(A) (2005). The Secretary of State, acting under statutory authority, *see* Ariz. Rev. Stat. § 16-452(A), (B), promulgated a procedure specifying the "forms of identification" accepted under the statute, which included photograph-bearing documents such as driver's licenses as well as non-photograph-bearing documents such as utility bills or

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[30] Congress's authority under the Elections Clause is limited to preempting state regulations as they relate to federal elections. Therefore, our holding invalidating Proposition 200's registration provision does not prevent Arizona from applying a proof of citizenship requirement to voter registrations for state elections. However, because Arizona has presented its system of voter registration as concurrently registering voters for state and federal elections, we do not consider whether Proposition 200's registration provision, as applied only to voter registrations for state elections, is valid under Gonzalez and ITCA's remaining claims.

bank statements. In 2009, the state legislature amended section 16-579 to codify that procedure.[31]

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[31] Section 16-579(A)(1) now provides that a voter must "present any of the following" before being permitted to vote:

> (a) A valid form of identification that bears the photograph, name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including an Arizona driver license, an Arizona nonoperating identification license, a tribal enrollment card or other form of tribal identification or a United States federal, state or local government issued identification. Identification is deemed valid unless it can be determined on its face that it has expired.
>
> (b) Two different items that contain the name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including a utility bill, a bank or credit union statement that is dated within ninety days of the date of the election, a valid Arizona vehicle registration, an Arizona vehicle insurance card, an Indian census card, tribal enrollment card or other form of tribal identification, a property tax statement, a recorder's certificate, a voter registration card, a valid United States federal, state or local government issued identification or any mailing that is labeled as "official election material." Identification is deemed valid unless it can be determined on its face that it has expired.
>
> (c) A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register or the identification is a valid United States Military identification card or a valid United States passport and does not bear an address, the

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Gonzalez and ITCA challenge Proposition 200's polling place provision on three grounds: that it is a prohibited voting qualification under section 2 of the VRA, an unconstitutional poll tax under the Twenty-fourth Amendment, and a violation of the Fourteenth Amendment's Equal Protection Clause. We first consider Gonzalez's argument that Proposition 200's polling place provision violates section 2 of the VRA.

A

Section 2(a) of the VRA prohibits states from imposing any voting qualification that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." *Id.* § 1973(b). Said otherwise, a plaintiff can prevail in a section 2 claim only if, "based on the totality of the circumstances, . . . the challenged voting practice results in discrimination on account of race." *Farrakhan v. Washington,*

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identification must be accompanied by one of the items listed in subdivision (b) of this paragraph.

338 F.3d 1009, 1017 (9th Cir. 2003) (emphasis omitted); *see also United States v. Blaine Cnty.*, 363 F.3d 897, 903 (9th Cir. 2004). Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, *see Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998) (per curiam), proof of "causal connection between the challenged voting practice and a prohibited discriminatory result" is crucial, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (internal quotation marks and brackets omitted); *see also id.* ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry."). Said otherwise, a § 2 challenge "based purely on a showing of some relevant statistical disparity between minorities and whites," without any evidence that the challenged voting qualification causes that disparity, will be rejected. *Id.*[32]

In applying the totality of the circumstances test, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. No. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205). In *Gingles*, the Supreme Court cited a non-exhaustive list of nine factors (generally referred to

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[32] This approach applies both to claims of vote denial and of vote dilution. *Id.* at 596 n.8.

as the "Senate Factors" because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making this totality of the circumstances assessment. *Id.* at 44-45. Relevant here, the factors direct courts to consider the history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07); *see Farrakhan,* 338 F.3d at 1016, 1020. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles,* 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 209) (internal quotation marks omitted).

Gonzalez argues that Proposition 200 disparately impacts Latino voters, unlawfully diluting their right to vote and denying them the right to vote by providing them with less opportunity than other members of the electorate to participate in the political process. Considering both Proposition 200's registration requirement and its requirement that voters who cast ballots at the polls present specified identification, the district court determined, after "examining the facts as a whole, [that] Proposition 200 does not have

a statistically significant disparate impact on Latino voters."[33] In considering the Senate Factors listed above, the district court found that Latinos had suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting. Nevertheless, the district court concluded that Gonzalez's claim failed because there was no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos. The district court noted that not a single expert testified to a causal connection between Proposition 200's requirements and the observed difference in the voting rates of Latinos, and that Gonzalez had failed to explain how Proposition 200's requirements interact with the social and historical climate of discrimination to impact Latino voting in Arizona. Therefore, the district court concluded that Gonzalez

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[33] Judge Pregerson's dissent relies heavily on statistical analysis prepared by the plaintiffs' expert, Dr. Louis Lanier. Dis. op. at 4197-98. The state's expert, however, testified that Lanier's results were unreliable in light of several factors, including the absence of evidence that the Latinos whose votes went uncounted were qualified to vote. In holding that the plaintiffs had not shown that Proposition 200 had a statistically significant impact on Latino voters, the district court implicitly rejected Lanier's testimony, a conclusion that is "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

had not proved that Proposition 200 results in discrimination "on account of race or color."

Because a § 2 analysis requires the district court to engage in a "searching practical evaluation of the 'past and present reality,'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. 97-417, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 208), a district court's examination in such a case is "intensely fact-based and localized," *Salt River*, 109 F.3d at 591. We therefore "[d]efer[ ] to the district court's superior fact-finding capabilities," *id.*, and review for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2, *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000) (citing *Gingles*, 478 U.S. at 78-79). We review de novo the district court's legal determinations and mixed findings of law and fact. *Salt River*, 109 F.3d at 591.

The district court did not clearly err in concluding that Gonzalez failed to establish that Proposition 200's polling place provision, *see* Ariz. Rev. Stat. § 16-579, had a disparate impact on Latinos. To prove a § 2 violation, Gonzalez had to establish that this requirement, as applied to Latinos, caused a prohibited discriminatory result. Here, Gonzalez alleged that "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to . . . cast a ballot," but produced no

evidence supporting this allegation.[34] The record does include evidence of Arizona's general history of discrimination against Latinos and the existence of racially polarized voting. But Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice. Without such evidence, we cannot say that the district court's finding that Gonzalez failed to prove causation was clearly erroneous. Therefore we affirm the district court's denial of Gonzalez's VRA claim.[35]

B

We next consider Gonzalez and ITCA's claim that Proposition 200's polling place provision violates the Twenty-fourth Amendment to the U.S. Constitution.[36]

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[34] The dissent likewise fails to cite any evidence to support the theory that Proposition 200's polling place provision "has the effect of keeping Latino voters away from the polls" because it "evokes fear of discrimination." Dis. op. at 4200.

[35] Gonzalez also argues that the district court erred in evaluating one of the Senate Factors and in concluding that the disparate impact on Latinos was statistically insignificant. Because the failure to show causation is dispositive, however, we need not reach these issues.

[36] Although ITCA's briefing collapses the Twenty-fourth and Fourteenth Amendment poll tax claims into a single argument, these are different claims that arise under different constitutional

(Continued on following page)

The Twenty-fourth Amendment provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV, § 1. Gonzalez and ITCA do not argue that requiring voters to show identification at the polls is itself a poll tax. Rather, they argue that, because some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote.

This analysis is incorrect. Although obtaining the identification required under § 16-579 may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax. *Cf. Harman*, 380 U.S. at 541-42.

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amendments. The Twenty-fourth Amendment extends only to federal elections, *see Harman v. Forssenius*, 380 U.S. 528, 540 (1965), whereas the Fourteenth Amendment can also invalidate restrictions on the right to vote in state elections, *see Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). We will therefore address these two claims separately.

Our conclusion is consistent with *Harman,* the only Supreme Court case considering the Twenty-fourth Amendment's ban on poll taxes. In that case, the Court considered a state statute that required voters to either pay a $1.50 poll tax on an annual basis or go through a "cumbersome procedure," *id.* at 541, for filing an annual certificate of residence, *id.* at 530-32. There was no dispute that the $1.50 fee, if it were a freestanding prerequisite for voting, would constitute a poll tax barred by the Twenty-fourth Amendment. *See id.* at 540. Accordingly, the only question before the Court was whether the state "may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence." *Id.* at 538. The Court enunciated the rule that a state may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. Applying this rule, the Court determined that the state's certificate of residence requirement was a material burden: among other things, the procedure for filing the certificate was unclear, the requirement that the certificate be filed six months before the election "perpetuat[ed] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," and the state had other alternatives to establish that voters were residents, including "registration, use of the criminal sanction, purging of registration lists, [and] challenges and oaths." *Id.* at 541-43. Accordingly, the

Court concluded that it was "constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

Proposition 200's polling place provision is not a poll tax under *Harman*. Requiring voters to show identification at the polls does not constitute a tax.[37] Nor does the identification requirement place a material burden on a voter "solely because of his refusal to waive [his] constitutional immunity" to a poll tax, *id.*; rather, under Proposition 200, all voters are required to present identification at the polls. Because Arizona's system does not, as a matter of law, qualify as a poll tax, we affirm the district court's conclusion that Proposition 200's polling place provision does not violate the Twenty-fourth Amendment.

C

Nor is Proposition 200's polling place provision an unconstitutional poll tax under the Fourteenth Amendment's Equal Protection Clause. *Harper* is the leading Supreme Court case considering whether a state law is a poll tax under the Fourteenth Amendment. In *Harper*, the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals

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[37] Voters who use an early ballot to vote do not even have to show identification. Ariz. Rev. Stat. § 16-550(A) (for early ballots, elector identity is verified by signature comparison alone).

exercising their right to vote was unconstitutional under the Equal Protection Clause. 383 U.S. at 664-66 & n.1. The Court held that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications," and that the imposition of poll taxes fell outside this power because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. Because the state's poll tax made affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter qualifications, the Court concluded that the tax was invidiously discriminatory and a per se violation of the Equal Protection Clause. *Id.* at 666-67.

Proposition 200's polling place provision falls outside of *Harper*'s rule that "restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford,* 553 U.S. at 189 (Stevens, J., announcing the judgment of the Court). Requiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents. On the contrary, such a requirement falls squarely within the state's power to fix core voter qualifications. Nevertheless, ITCA argues that the Court's more recent decision in *Crawford,* 553 U.S. 181, extended *Harper*'s holding that an electoral standard based on voter affluence is invidiously discriminatory (and thus a per se violation of the Equal Protection Clause) to

encompass indirect fees, such as the fees or costs necessary to obtain identification documents.

ITCA's argument is based on a misreading of *Crawford*. *Crawford* involved an Indiana state requirement that a citizen voting in person or at the office of the circuit court clerk before election day present a photo identification card issued by the government. *Id.* at 185. The state would provide a free photo identification to "qualified voters able to establish their residence and identity." *Id.* at 186. A number of plaintiffs challenged this requirement on the ground that the "new law substantially burden[ed] the right to vote in violation of the Fourteenth Amendment." *Id.* at 187. Although the Court was unable to agree on the rationale for upholding Indiana's photo identification requirement,[28] neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied. *See id.* at 203-04. The lead opinion, upon which ITCA relies, explained that *Harper*'s "litmus test" made "even rational restrictions on the right to vote . . . invidious if they are unrelated to voter qualifications." *Id.* at 189-90. But according to the lead opinion, later election cases had moved away from *Harper* to apply a balancing test to state-imposed burdens on the voting process. *Id.* Under these later cases, a court "must identify and

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[28] The lead opinion authored by Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia filed a concurring opinion joined by Justices Thomas and Alito. Justices Ginsburg, Souter, and Breyer dissented.

evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 190. The lead opinion then proceeded to apply this balancing test to the Indiana photo identification requirement. *Id.* at 191-200. Because *Crawford* did not extend *Harper*'s per se rule to other burdens imposed on voters, it does not support ITCA's argument that Proposition 200's identification requirement is per se invalid.

Although ITCA's reliance on *Crawford* is not entirely clear, ITCA does not appear to argue that Proposition 200's polling place provision is invalid under *Crawford*'s balancing test. Such an argument would be unavailing in any event. The lead opinion in *Crawford* held that the burden imposed on citizens who must obtain a photo identification document was not sufficiently heavy to support a facial attack on the constitutionality of the state law, in light of the state's legitimate interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. *Id.* at 191, 202-03. The same reasoning is applicable here. While the lead opinion noted that photo identification cards were provided for free by Indiana, it also recognized that to obtain these free cards, prospective voters needed to "present at least one 'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Id.* at 198 n.17. Obtaining these primary documents, the

Supreme Court acknowledged, may require payment of a fee. *Id.* Because Proposition 200's polling place provision allows voters to present these same sorts of primary documents, Proposition 200 is no more burdensome than the identification requirement upheld in *Crawford*. Nor has ITCA suggested any reason why Arizona's interests in imposing a photo identification requirement would be less weighty than the state interests at issue in *Crawford*. Therefore, even under the balancing test set forth in *Crawford*'s lead opinion, we would uphold Proposition 200's polling place identification requirement against a facial challenge.

In sum, because any payment associated with obtaining the documents required under Proposition 200's polling place provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under *Harper*, and the burden is minimal under *Crawford*. As such, the polling place provision does not violate the Fourteenth Amendment's Equal Protection Clause.

IV

Our system of dual sovereignty, which gives the state and federal governments the authority to operate within their separate spheres, "is one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). "Just as

the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (internal quotation marks omitted). Despite our respect for the state's exercise of its sovereign authority, however, the Constitution's text requires us to safeguard the specific enumerated powers that are bestowed on the federal government. The authority granted to Congress under the Elections Clause to "make or alter" state law regulating procedures for federal elections is one such power. The Framers of the Constitution were clear that the states' authority to regulate federal elections extends only so far as Congress declines to intervene. *See* U.S. Const. art. 1, § 4, cl. 1; *Foster,* 522 U.S. at 69. Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections, Ariz. Rev. Stat. § 16-166(F). We uphold Proposition 200's polling place provision with respect to all other claims.[20]

AFFIRMED in part and REVERSED in part.

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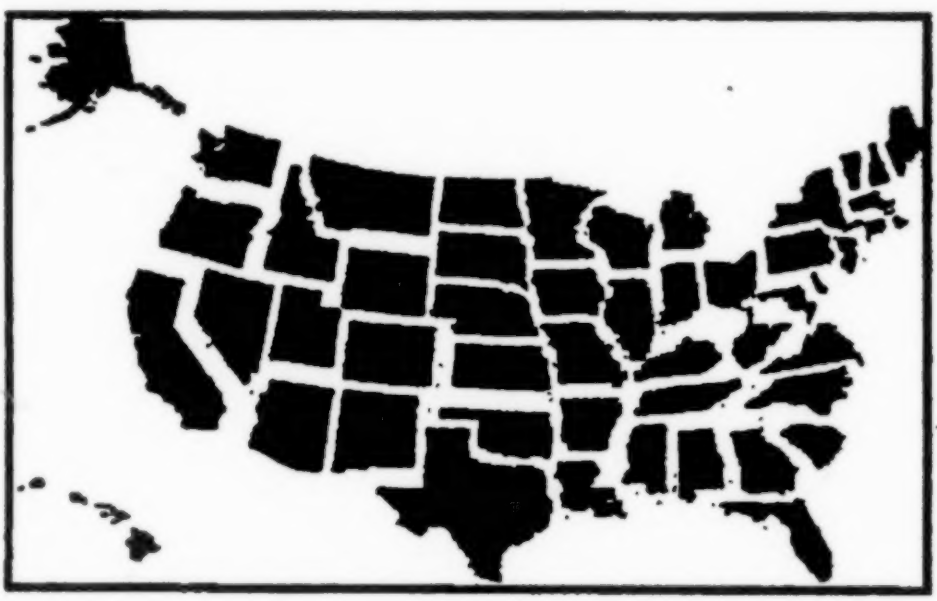
[20] Each party shall bear its own costs on appeal.

APPENDIX TO THE OPINION

Register To Vote In Your State
By Using This
Postcard Form and Guide



For U.S. Citizens

General Instructions

'ho Can Use this Application
you are a U.S. citizen who lives or has an address ithin the United States, you can use the application in is booklet to:

- Register to vote in your State,
- Report a change of name to your voter registration office,
- Report a change of address to your voter registration office, or
- Register with a political party.

ceptions
ease do not use this application if you live outside e United States and its territories and have no home gal) address in this country, *or* if you are in the ilitary stationed away from home. Use the Federal stcard Application available to you from military ases, American embassies, or consular offices.

ew Hampshire town and city clerks will accept this plication only as a request for their own absentee ter mail-in registration form.
orth Dakota does not have voter registration.
'yoming law does not permit mail registration.

ow to Find Out If You Are Eligible to Register to ote in Your State
ch State has its own laws about who may register and te. Check the information under your State in the ate Instructions. All States require that you be a United ates citizen by birth or naturalization to register to vote federal and State elections. Federal law makes it illegal falsely claim U.S. citizenship to register to vote in any deral, State, or local election. You cannot be registered vote in more than one place at a time.

ow to Fill Out this Application
se both the Application Instructions and State structions to guide you in filling out the application.

- First, read the Application Instructions. These instructions will give you important information that applies to everyone using this application.
- Next, find your State under the State Instructions. Use these instructions to fill out Boxes 6, 7, and 8. Also refer to these instructions for information about voter eligibility and any oath required for Box 9.

'hen to Register to Vote
ch State has its own deadline for registering to vote. heck the deadline for your State on the last page of is booklet.

How to Submit Your Application
l your application to the address listed under yo r State in the State Instructions. Or, deliver the application in person to your local voter registration office. The States that are required to accept the national form will accept copies of the application printed from the computer image on regular paper stock, signed by the applicant, and mailed in an envelope with the correct postage.

First Time Voters Who Register by Mail
If you are registering to vote for the first time in your jurisdiction and are mailing this registration application, Federal law requires you to show proof of identification the first time you vote. Proof of identification includes:

- A current and valid photo identification or
- A current utility bill, bank statement, government check, paycheck or government document that shows your name and address.

Voters may be exempt from this requirement if they submit a COPY of this identification with their mail in voter registration form. If you wish to submit a COPY, please keep the following in mind:

- Your state may have additional identification requirements which may mandate you show identification at the polling place even if you meet the Federal proof of identification.
- Do not submit original documents with this application, only COPIES.

If You Were Given this Application in a State Agency or Public Office
If you have been given this application in a State agency or public office, it is your choice to use the application. If you decide to use this application to register to vote, you can fill it out and leave it with the State agency or public office. The application will be submitted for you. Or, you can take it with you to mail to the address listed under your State in the State Instructions. You also may take it with you to deliver in person to your local voter registration office.
Note: The name and location of the State agency or public office where you received the application will remain confidential. It will not appear on your application. Also, if you decide not to use this application to register to vote, that decision will remain confidential. It will not affect the service you receive from the agency or office.

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Application Instructions

Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen and whether you will be 18 years old on or before Election Day. If you answer no to either of these questions, you may not use this form to register to vote. However, state specific instructions may provide additional information on eligibility to register to vote prior to age 18.

Box 1 — Name
Put in this box your full name in this order — Last, First, Middle. Do not use nicknames or initials.
Note: If this application is for a change of name, please tell us in Box A *(on the bottom half of the form)* your full name before you changed it.

Box 2 — Home Address
Put in this box your home address (legal address). Do not put your mailing address here if it is different from your home address. Do not use a post office box or rural route without a box number. Refer to state-specific instructions for rules regarding use of route numbers.

Note: If you were registered before *but* this is the first time you are registering from the address in Box 2, please tell us in Box B *(on the bottom half of the form)* the address where you were registered before. Please give us as much of the address as you can remember.

Also Note: If you live in a rural area but do not have a street address, *or* if you have no address, please show where you live using the map in Box C *(at the bottom of the form)*.

Box 3 — Mailing Address
If you get your mail at an address that is different from the address in Box 2, put your mailing address in this box. If you have no address in Box 2, you must write in Box 3 an address where you can be reached by mail.

Box 4 — Date of Birth
Put in this box your date of birth in this order — Month, Day, Year. *Be careful not to use today's date!*

Box 5 — Telephone Number
Most States ask for your telephone number in case there are questions about your application. However, you do not have to fill in this box.

Box 6 — ID Number
Federal law requires that states collect from each registrant an identification number. You must refer to your state's specific instructions for item 6 regarding information on what number is acceptable for your state. If you have neither a drivers license nor a social security number, please indicate this on the form and a number will be assigned to you by your state.

Box 7 — Choice of Party
In some States, you must register with a party if you want to take part in that party's primary election, caucus, or convention. To find out if your State requires this, see item 7 in the instructions under your State.

If you want to register with a party, print in the box the full name of the party of your choice.

If you do not want to register with a party, write "no party" or leave the box blank. Do not write in the word "independent" if you mean "no party," because this might be confused with the name of a political party in your State.
Note: If you do not register with a party, you can still vote in general elections and nonpartisan (nonparty) primary elections.

Box 8 — Race or Ethnic Group
A few States ask for your race or ethnic group, in order to administer the Federal Voting Rights Act. To find out if your State asks for this information, see item 8 in the instructions under your State. If so, put in Box 8 the choice that best describes you from the list below:

- American Indian *or* Alaskan Native
- Asian or Pacific Islander
- Black, *not of* Hispanic Origin
- Hispanic
- Multi-racial
- White, *not of* Hispanic Origin
- Other

Box 9 — Signature
Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that:

(1) You meet your State's requirements, and
(2) You understand all of Box 9.

Finally, sign your full name or make your mark, and print today's date in this order — Month, Day, Year. If the applicant is unable to sign, put in Box D the name, address, and telephone number (optional) of the person who helped the applicant.

Voter Registration Application

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America?
Will you be 18 years old on or before election day?
If you checked "No" in response to either of these questions, do not complete form.
(Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)

This space for office use only.

1		Last Name	First Name	Middle Name(s)	
2	Home Address		Apt. or Lot #	City/Town	State	Zip Code
3	Address Where You Get Your Mail If Different From Above			City/Town	State	Zip Code
4	Date of Birth Month Day Year	5	Telephone Number (optional)	6	ID Number - (See item 6 in the instructions for your state)
7	Choice of Party (see item 7 in the instructions for your State)	8	Race or Ethnic Group (see item 8 in the instructions for your State)		

9 I have reviewed my state's instructions and I swear/affirm that:
- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required.
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.

Please sign full name (or put mark) ▲

Date: Month / Day / Year

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a change of name, what was your name before you changed it?

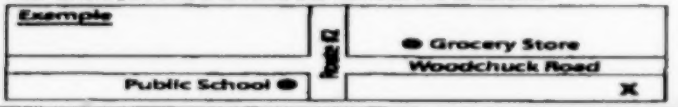
A		Last Name	First Name	Middle Name(s)	

If you were registered before but this is the first time you are registering from the address in Box 2, what was your address where you were registered before?

B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C
- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live.
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.



If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D

Mail this application to the address provided for your State.

FOR OFFICIAL USE ONLY

OFFICIAL
ELECTION MAIL

Voter Registration Application

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? ☐ Yes ☐ No
Will you be 18 years old on or before election day? ☐ Yes ☐ No
If you checked "No" in response to either of these questions, do not complete form.
Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)

This space for office use only.

1	(Circle one) Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle one) Jr Sr II III IV
2	Home Address	Apt. or Lot #	City/Town	State	Zip Code
3	Address Where You Get Your Mail If Different From Above		City/Town	State	Zip Code
4	Date of Birth ____ Month Day Year	5 Telephone Number (optional)	6 ID Number - (See item 6 in the instructions for your state)		
7	Choice of Party (see item 7 in the instructions for your State)	8 Race or Ethnic Group (see item 8 in the instructions for your State)			

9 I have reviewed my state's instructions and I swear/affirm that:
- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required.
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.

Please sign full name (or put mark) ✍

Date: ____ / ____ / ____ Month Day Year

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a change of name, what was your name before you changed it?

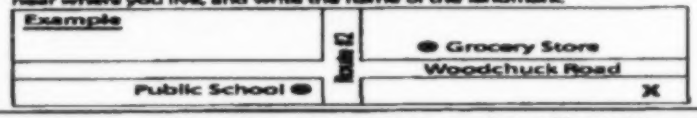
A	Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle one) Jr Sr II III IV

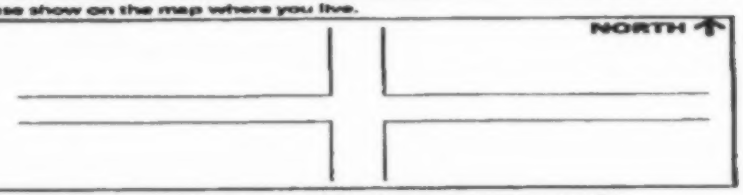
If you were registered before but this is the first time you are registering from the address in Box 2, what was your address where you were registered before?

B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C
- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live.
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.





If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D

Mail this application to the address provided for your State.

FOR OFFICIAL USE ONLY

OFFICIAL
ELECTION MAIL
Authorized by the U.S. Postal Service

00

State Instructions

[redacted]

Updated: 03-01-2006

Registration Deadline — Voter registration is closed during the ten days preceding an election. Applications must be postmarked or delivered by the eleventh day prior to the election.

6. ID Number. Your social security number is requested (by authority of the Alabama Supreme Court, 17-4-122).
7. Choice of Party. Optional: You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box; however, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Alabama you must:
- be a citizen of the United States
- be a resident of Alabama and your county at the time of registration
- be 18 years old before any election
- not have been convicted of a felony punishable by imprisonment in the penitentiary (or have had your civil and political rights restored)
- not currently be declared mentally incompetent through a competency hearing
- swear or affirm to "support and defend the Constitution of the U.S. and the State of Alabama and further disavow any belief or affiliation with any group which advocates the overthrow of the governments of the U.S. or the State of Alabama by unlawful means and that the information contained herein is true, so help me God"

Mailing address:
Office of the Secretary of State
P.O. Box 5616
Montgomery, AL 36103-5616

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide one of the following identification numbers: Alaska Driver's License or Alaska State Identification Card Number. If you do not have an Alaska Driver's License or Alaska State Identification Card, you must provide the last four digits of your Social Security Number. If you do not have any of these identification numbers, please write "NONE" on the form. A unique identifying number will be assigned to you for voter registration purposes. This information is kept confidential. Having this information assists in maintaining your voter record and may assist in verifying your identity (Title 15 of the Alaska Statutes).
7. Choice of Party. You do not have to declare a party affiliation when registering to vote. If you do not choose a party, you will be registered as Undeclared. Alaska has a closed primary election system. Each recognized political party has a separate ballot listing only candidates from that political party. Voters registered as a member of a political party may only vote that party's ballot. Voters registered as undeclared or non-partisan may choose one ballot from the ballots available.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Alaska you must:
- be a citizen of the United States
- be at least 18 years old within 90 days of completing this registration
- be a resident of Alaska
- not be a convicted felon (unless unconditionally discharged)
- not be registered to vote in another State

Mailing address:
Division of Elections
State of Alaska
PO Box 110017
Juneau, AK 99811-0017

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your completed voter registration form must contain the number of your Arizona driver license, or non-operating identification license issued pursuant to A.R.S. § 28-3165. If the license is current and valid. If you *do not have* a current and valid Arizona driver license or non-operating identification license, you must include the last four digits of your social security number if one has been issued to you. If you do not have a current and valid driver license or non-operating identification license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the Secretary of State.

State Instructions

7. Choice of Party. If you are registered in a political party which has qualified for ballot recognition, you will be permitted to vote the primary election ballot for that party. If you are registered as an independent, no party preference or as a member of a party which is not qualified for ballot recognition, you may select and vote one primary election ballot for one of the recognized political parties.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arizona you must:
- be a citizen of the United States
- be a resident of Arizona and your county at least 29 days preceding the next election
- be 18 years old on or before the next general election
- not have been convicted of treason or a felony (or have had your civil rights restored)
- not currently be declared an incapacitated person by a court of law

Mailing address:
Secretary of State/Elections
1700 W. Washington, 7th Floor
Phoenix, AZ 85007-2888

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Optional. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arkansas you must:
- be a citizen of the United States
- live in Arkansas at the address in Box 2 on the application
- be at least 18 years old before the next election
- not be a convicted felon (or have completely discharged your sentence or been pardoned)
- not claim the right to vote in any other jurisdiction
- not previously be adjudged mentally incompetent by a court of competent jurisdiction

Mailing address:
Secretary of State
Voter Services
P.O. Box 8111
Little Rock, AR 72203-8111

[redacted]

Updated: 03-01-2006

Registration Deadline — 15 days before the election.

6. ID Number. When you register to vote, you must provide your California driver's license or California identification card number, if you have one. If you do not have a driver's license or ID card, you must provide the last four digits of your Social Security Number (SSN). If you do not include this information, you will be required to provide identification when you vote.
7. Choice of Party. Please enter the name of the political party with which you wish to register. If you do not wish to register with any party, enter "Decline to State" in the space provided.
California law allows voters who "decline to state" an affiliation with a qualified political party or who affiliate with a nonqualified political party to vote in the primary election of any qualified political party that files a notice with the Secretary of State allowing them to do so. You can call 1-800-345-VOTE or visit www.ss.ca.gov to learn which political parties are allowing nonaffiliated voters to participate in their primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in California you must:
- be a citizen of the United States
- be a resident of California
- be at least 18 years of age at the time of the next election
- not be imprisoned or on parole for the conviction of a felony
- not currently be judged mentally incompetent by a court of law

Signature is required. If you meet the requirements listed above, please sign and date the registration card in the space provided.

Mailing address:
Secretary of State
Elections Division
1500 11th Street
Sacramento, CA 95814

State Instructions

[redacted]

Updated: 03-28-2008

Registration Deadline — 29 days before the election. If the application is received in the mails without a postmark, it must be received within 5 days of the close of registration.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or identification number. If you do not have a driver's license or state issued identification, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Colorado you must:
- be a citizen of the United States
- be a resident of Colorado 30 days prior to the election
- be 18 years old on or before election day
- not be confined as a prisoner or serving any part of a sentence under mandate

Mailing address:
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

[redacted]

Updated: 03-01-2006

Registration Deadline — 14 days before the election.

6. ID Number. Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.
7. Choice of Party. This is optional, but you must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Connecticut you must:
- be a citizen of the United States
- be a resident of Connecticut and of the town in which you wish to vote
- be 17 years old. You can vote when you turn 18
- have completed confinement and parole if previously convicted of a felony, and have had your voting rights restored by Registrars of Voters.
- not currently be declared mentally incompetent to vote by a court of law

Mailing address:
Secretary of State
Elections Division
30 Trinity Street
Hartford, CT 06106

[redacted]

Updated: 03-28-2008

Registration Deadline — The 4th Saturday before a primary or general election, and 10 days before a special election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Delaware you must:
- be a citizen of the United States
- be a permanent resident of Delaware
- be at least 18 years old on the date of the next general election
- felons are eligible to vote if certain requirements are met: fines and sentence completed at least five years prior to application date; felony convictions can not be disqualifying felonies, which are murder, sexual offenses, or crimes against public administration involving bribery or improper influence or abuse of office.
- not be mentally incompetent

Mailing address:
Commissioner of Elections
111 S. West St., Suite 10
Dover, DE 19904

[redacted]

Updated: 10-29-2003

Registration Deadline — 30 days before the election.

6. ID Number. Federal law now requires that all voter registration applications must include either the applicant's driver's license number or the last four digits of the applicant's social security number in order to be processed.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in the District of Columbia you must:
- be a citizen of the United States
- be a District of Columbia resident at least 30 days preceding the next election
- be at least 18 years old on or preceding the next election
- not be in jail for a felony conviction
- not have been judged "mentally incompetent" by a court of law
- not claim the right to vote anywhere outside D.C.

Mailing address:
District of Columbia Board of Elections & Ethics
441 4th Street, NW, Suite 250
Washington, DC 20001-2745

[redacted]

Updated: 09-12-2006

Registration Deadline — 29 days before the election.

6. ID Number. If you have one, you must provide your Florida driver's license number or Florida identification card number. If you do not have a Florida driver's license or identification card, you must provide the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Florida you must:
- be a citizen of the United States
- be a legal resident of both the State of Florida and of the county in which you seek to be registered
- be 18 years old (you may pre-register if you are 17)
- not now be adjudicated mentally incapacitated with respect to voting in Florida or any other State
- not have been convicted of a felony without your civil rights having been restored pursuant to law
- not claim the right to vote in another county or state
- swear or affirm the following: "I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, that I am qualified to register as an elector under the Constitution and laws of the State of Florida, and that I am a citizen of the United States and a legal resident of Florida"

Mailing address:
State of Florida
Department of State
Division of Elections
The R.A. Gray Building
500 South Bronough St, Rm 316
Tallahassee, Florida 32399-0250

[redacted]

Updated: 03-28-2006

Registration Deadline — The fifth Monday before any general primary, general election, or presidential preference primary, or regularly scheduled special election pursuant to the Georgia Election Code. In the event that a special election is scheduled on a date other that those dates prescribed by the Georgia Election Code, registration would close on the 5th day after the call.

6. ID Number. Federal law requires you to provide your full GA Drivers License number or GA State issued ID number. If you do not have a GA Drivers License or GA ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a GA Drivers License or Social Security number, a unique identifier will be provided for you.
7. Choice of Party. You do not have to register with a party to take part in that party's primary, caucus or convention.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Georgia you must:
- be a citizen of the United States
- be a legal resident of Georgia and of the county in which you want to vote

- be 18 years old within six months after the day of registration, and be 18 years old to vote
- not be serving a sentence for having been convicted of a felony
- not have been judicially determined to be mentally incompetent, unless the disability has been removed

Mailing address:
Elections Division
Office of the Secretary of State
1104 West Tower
2 Martin Luther King, Jr. Dr. SE
Atlanta, GA 30334-1505

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application (Hawaii Revised Statutes, Section 11-15).
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Race or ethnic group information is not required for voter registration.
9. Signature. To register in Hawaii you must:
- be a citizen of the United States
- be a resident of the State of Hawaii
- be at least 16 years old (you must be 18 years old by election day in order to vote)
- not be incarcerated for a felony conviction
- not be adjudicated by a court as "non compos mentis"

Mailing address:
Office of Elections
State of Hawaii
802 Lehua Avenue
Pearl City, HI 96782

[redacted]

Updated: 03-01-2006

Registration Deadline — 25 days before the election.
6. ID Number. Enter your driver's license number. If you have no driver's license, enter the last 4 digits of your social security number.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Idaho you must:
- be a citizen of the United States
- have resided in Idaho and in the county for 30 days prior to the day of election
- be at least 18 years old
- not have been convicted of a felony, and without having been restored to the rights of citizenship, or confined in prison on conviction of a criminal offense

Mailing address:
Secretary of State
P.O. Box 83720
State Capitol Bldg.
Boise, ID 83720-0080

[redacted]

Updated: 03-01-2006

Registration Deadline — 28 days prior to each election.

6. ID Number. Your driver's license number is required to register to vote. If you do not have a driver's license, at least the last four digits of your social security number are required. If you have neither, please write "NONE" on the form. A unique identifier will be assigned to you by the State.
7. Choice of Party. Party registration or preference is not required for voter registration. However, when you apply for a primary ballot, you must indicate your party preference for that election.
8. Race or Ethnic Group. Leave blank.
9. Signature. A signature is required. If signature is missing from registration form, you will be notified your registration is incomplete.
To register in Illinois you must:
- be a citizen of the United States
- be a resident of Illinois and of your election precinct at least 30 days before the next election
- be at least 18 years old on or before the next election
- not be in jail for a felony conviction
- not claim the right to vote anywhere else

Mailing address:
State Board of Elections
1020 S. Spring Street
Springfield, IL 62704

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your state voter ID number is your ten digit Indiana issued driver's license number. If you do not possess an Indiana driver's license then provide the last four digits of your social security number. Please indicate which number was provided. (Indiana Code 3-7-13-13)
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Indiana you must:
- be a citizen of the United States
- have resided in the precinct at least 30 days before the next election
- be at least 18 years of age on the day of the next general election
- not currently be in jail for a criminal conviction

Mailing address:
Election Division
Office of the Secretary of State
302 West Washington Street,
Room E-204
Indianapolis, IN 46204-2743

[redacted]

Updated: 03-28-2006

Registration Deadline — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others.* Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.

*If you fail to meet the voter registration deadlines above you can register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website: http://www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf.

6. ID Number. Your ID number is your Iowa driver's license number (or Iowa non-driver identification number) if you have one, if not then the last four digits of your social security number. The ID number you provide will be verified with the Iowa Department of Transportation or the Social Security Administration.
7. Choice of Party. You may, but do not have to, register with a party in advance if you want to take part in that party's primary election. You may change or declare a party affiliation at the polls on primary election day.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Iowa you must:
- be a citizen of the United States
- be a resident of Iowa
- be at least 17-1/2 years old (you must be 18 to vote)
- not have been convicted of a felony (or have had your rights restored)
- not currently be judged by a court to be "incompetent to vote"
- not claim the right to vote in more than one place
- give up your right to vote in any other place

Mailing address:
Elections Division
Office of the Secretary of State
Lucas Building-1st Floor
321 E. 12th Street
Des Moines, IA 50319

[redacted]

Updated: 03-01-2006

Registration Deadline — Postmarked or delivered 15 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nondriver's identification card number. If you do not have a driver's license or nondriver's identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a nondriver's identification card or social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. The number you provide will be used for administrative purposes only and will not be disclosed to the public. (KSA 25-2309).
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kansas you must:
- be a citizen of the United States
- be a resident of Kansas
- be 18 by the next election
- have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote
- not claim the right to vote in any other location or under any other name
- not be excluded from voting for mental incompetence by a court of competent jurisdiction

702c

Mailing address:
Secretary of State
1st Floor, Memorial Hall
120 SW 10th Ave.
Topeka, KS 66612-1594

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your full social security number is required. It is used for administrative purposes only and is not released to the public (KRS 116.155). No person shall be denied the right to register because of failure to include social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kentucky you must:
- be a citizen of the United States
- be a resident of Kentucky
- be a resident of the county for at least 28 days prior to the election date
- be 18 years of age on or before the next general election
- not be a convicted felon or if you have been convicted of a felony, your civil rights must have been restored by executive pardon
- not have been judged "mentally incompetent" in a court of law
- not claim the right to vote anywhere outside Kentucky

Mailing address:
State Board of Elections
140 Walnut Street
Frankfort, KY 40601-3240

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Louisiana driver's license number, if issued. If not issued, you must provide at least the last four digits of your social security number, if issued. The full social security number may be provided on a voluntary basis. Neither the registrar nor the Department of State shall disclose the social security number of a registered voter or circulate the social security numbers of registered voters on commercial lists (R.S. 18:104 and 154; 42 U.S.C. 405).
7. Choice of Party. If you do not list a party affiliation, you cannot vote in the Presidential Preference Primary and party committee elections. Political party affiliation is not required for any other election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Louisiana you must:
- be a citizen of the United States
- be a resident of Louisiana. Residence address must be address where you claim homestead exemption, if any.
- be at least 17 years old, and be 18 years old prior to the next election to vote
- not currently be under an order of imprisonment for conviction of a felony
- not currently be under a judgment of interdiction for mental incompetence

Mailing address:
Secretary of State
Attention: Voter Registration
P.O. Box 94125
Baton Rouge, LA 70804-9125

[redacted]

Updated: 03-01-2006

Registration Deadline — Delivered 10 business days before the election (or a voter may register *in-person* up to and including election day).

6. ID Number. You must list your valid Maine driver's license number. If you don't have a valid Maine driver's license, then you must provide the last four digits of your Social Security Number. Voters who don't have either of these forms of ID must write "NONE" in this space.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless otherwise permitted by a political party).
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maine you must:
- be a citizen of the United States
- be a resident of Maine and the municipality in which you want to vote
- be at least 17 years old (you must be 18 years old to vote)

Mailing address:
Elections Division
Bureau of Corporations,
Elections and Commissions
101 State House Station
Augusta, ME 04333-0101

State Instructions

[redacted]

Updated: 06-26-2008

Registration Deadline — 9:00 p.m. 21 days before the election.

6. ID Number. If you have a current, valid Maryland driver's license or a Motor Vehicle Administration identification card, you must enter the driver's license or identification number. If you do not have a current, valid Maryland driver's license or Motor Vehicle Administration identification card, you must enter at least the last 4 digits of your social security number. However, please note, the disclosure of your full Social Security number is voluntary. The statutory authority allowing election officials to request your full Social Security number is Election Law Article, Section 3-202, Annotated Code of Maryland. The number will be used only for registration and other administrative purposes. It will be kept confidential.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maryland you must:
- be a U.S. citizen
- be a Maryland resident
- be at least 18 years old by the next general election
- not be under guardianship for mental disability
- not have been convicted of buying or selling votes
- not have been convicted of a felony, or if you have, you have completed serving a court ordered sentence of imprisonment, including any term of parole or probation for the conviction.

Mailing address:
State Board of Elections
P.O. Box 6486
Annapolis, MD 21401-0486

[redacted]

Updated: 03-01-2006

Registration Deadline — 20 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a current and valid Massachusetts' driver's license then you must provide the last four (4) digits of your social security number. If you have neither, you must write "NONE" in the box and a unique identifying number will be assigned to you.
7. Choice of Party. If you do not designate a party of political designation in this box, you will be registered as unenrolled. Unenrolled voters may participate in party primaries. However, an unenrolled voter must enroll in a party on the day of the Presidential Preference Primary in order to participate in that primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Massachusetts you must:
- be a citizen of the United States
- be a resident of Massachusetts
- be 18 years old on or before the next election
- not have been convicted of corrupt practices in respect to elections
- not be under guardianship with respect to voting
- not be currently incarcerated for a felony conviction

Mailing address:
Secretary of the Commonwealth
Elections Division, Room 1705
One Ashburton Place
Boston, MA 02108

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or state issued personal identification card number. If you do not have a driver's license or state issued personal identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued personal identification card or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Michigan you must:
- be a citizen of the United States
- be 18 years old by the next election
- be a resident of Michigan and at least a 30 day resident of your city or township by election day
- not be confined in a jail after being convicted and sentenced

Notice: Michigan law requires that the same address be used for voter registration and driver license purposes. Therefore, if the residence address you provide on this form differs from the address shown on a driver license or personal identification card issued by the State of Michigan, the Secretary of State will automatically change your driver license or personal identification card address to match the residence address entered on this form. If an address change is made, the Secretary of State will mail you an address update sticker for your driver license or personal identification card.
Caution: If you register by mail, you must vote in person at your assigned precinct the first time you vote, unless you are:

- disabled as defined by state law;
- 60 years of age or older; or
- temporarily residing overseas.

Mailing address:
Michigan Department of State
Bureau of Elections
P.O. Box 20126
Lansing, MI 48901-0726

Updated: 12-31-2008

Registration Deadline — Delivered by 5:00 p.m. 21 days before the election (there is also election day registration at polling places).

6. ID Number. You are required to provide your Minnesota driver's license or state ID number to register to Vote. If you do not have a Minnesota driver's license or state ID then you will have to provide the last four digits of your social security number. If you have neither, please write "none" on the form.
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Minnesota you must:
- be a citizen of the United States
- be a resident of Minnesota for 20 days before the next election
- maintain residence at the address given on the registration form
- be at least 18 years old on election day
- if previously convicted of a felony, your felony sentence has expired or been completed, or you have been discharged from the sentence
- not be under a court-ordered guardianship in which the right to vote has been revoked
- not be found by a court to be legally incompetent to vote.

Mailing address:
Secretary of State
60 Empire Drive, Suite 100
St. Paul, MN 55103-1855

Updated: 03-07-2010

Registration Deadline — 30 days before the election.

6. ID Number. You are required to provide your current and valid driver's license number or, if you don't have one, the last four digits of your social security number.
7. Choice of Party. Mississippi does not have party registration. Therefore, you do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Mississippi you must:
- be a citizen of the United States
- have lived in Mississippi and in your county (and city, if applicable) 30 days before the election in which you want to vote
- be 18 years old by the time of the general election in which you want to vote
- have not been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, armed robbery, extortion, felony bad check, felony shoplifting, larceny, receiving stolen property, robbery, timber larceny, unlawful taking of a motor vehicle, statutory rape, carjacking, or bigamy, or have had your rights restored as required by law
- not have been declared mentally incompetent by a court

Note: State law changed by federal court order in 1998 and by state legislation in 2000. We now accept the form as registration for voting for all state and federal offices.

Mailing address:
Secretary of State
P.O. Box 136
Jackson, MS 39205-0136

Local county addresses:
You also may return completed applications to the county circuit clerk/registrar where you reside. A complete list of county circuit clerk/registrars is available on Mississippi's website at www.sos.ms.gov.

[redacted]

Updated: 09-12-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number. Your completed voter registration form must also include the last four digits of your social security number. (Section 115.155, RSMo). If you do not have a driver's license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. Any electronic media, printouts or mailing labels provided under this section shall not include telephone numbers and social security numbers of voters. (Section 115.157, RSMo).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To vote in Missouri you must:
- isang mamamayan ng Estados Unidos
- be a citizen of the United States
- be a resident of Missouri
- be at least 17-1/2 years of age (you must be 18 to vote)
- not be on probation or parole after conviction of a felony, until finally discharged from such probation or parole
- not be convicted of a felony or misdemeanor connected with the right of suffrage
- not be adjudged incapacitated by any court of law
- not be confined under a sentence of imprisonment

Mailing address:
Secretary of State
P.O. Box 1767
Jefferson City, MO 65102-1767

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Montana driver's license number. If you do not have a Montana driver's license number then you must list the LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER. If you have neither a driver's license, nor a social security number, please write "NONE" on the form. The state of Montana will assign to you a unique identifying number.
7. Choice of Party. Montana does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Montana you must:
- be a citizen of the United States
- be at least 18 years old on or before the election
- be a resident of Montana and of the county in which you want to vote for at least 30 days before the next election
- not be in a penal institution for a felony conviction
- not currently be determined by a court to be of unsound mind
- meet these qualifications by the next election day if you do not currently meet them

Mailing address:
Secretary of State's Office
P.O. Box 202801
State Capitol
Helena, MT 59620-2801

[redacted]

Updated: 03-01-2006

Registration Deadline — The third Friday before the election (or delivered by 6 p.m. on the second Friday before the election).

6. ID Number. You must provide your Nebraska driver's license number. If you do not have a Nebraska driver's license number then you must list the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nebraska you must:
- be a citizen of the United States
- be a resident of Nebraska
- be at least 18 years of age or will be 18 years of age on or before the first Tuesday after the first Monday of November
- not have been convicted of a felony, or if convicted, have had your civil rights restored
- not have been officially found to be mentally incompetent

Mailing address:
Nebraska Secretary of State
Suite 2300, State Capitol Bldg.
Lincoln, NE 68509-4608

[redacted]

Updated: 08-07-2010

Registration Deadline — The deadline for mail-in registration is the fifth Saturday before any primary or general election. In person registration remains available until 9:00 p.m. on the third Tuesday preceding any primary or general election. You may register to vote in person only by appearing at the office of the County Clerk/Registrar of Voters.

6. ID Number. You must supply a Nevada's Driver's License Number or Nevada ID Card Number if you have been issued one. If you do not have a Driver's License Number or Nevada ID Card Number, you must supply the last four digits of your Social Security Number. If you do not have a Social Security Number, please contact your County Clerk/Registrar of Voters to be assigned a unique identifier.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention. If you register with a minor political party, or as a Nonpartisan you will receive a Nonpartisan Ballot for the Primary Election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nevada you must:
- be a citizen of the United States
- have attained the age of 18 years on the date of the next election
- have continuously resided in the State of Nevada, in your county, at least 30 days and in your precinct at least 10 days before the next election
- have your civil rights restored if you were convicted of a felony
- not be determined by a court of law to be mentally incompetent
- claim no other place as your legal residence

Mailing address:
Secretary of State
Elections Division
101 North Carson Street
Suite 3
Carson City, NV 89701-4786

Applications may be returned to the Secretary of State's office at the address above, but to avoid possible delays, you are advised to return your completed voter registration applications directly to your local county election official.

Local county addresses:
To meet registration deadlines, especially during the two weeks before the close of the mail-in registration deadline, return completed applications to your respective County Clerk/Registrar of Voters. A complete list of County Clerk/Registrar of Voters and registration deadlines is available on Nevada's website: www.nvsos.gov.

[redacted]

Updated: 03-01-2006

Registration Deadline — New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form, which must be received by your city or town clerk by 10 days before the election.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form. You need to fill in only Box 1 and Box 2 or 3.

The application should be mailed to your town or city clerk at your zip code. These addresses are listed on the Secretary of State web site at http://www.state.nh.us/sos/clerks.htm

It should be mailed in plenty of time for your town or city clerk to mail you their own form and for you to return that form to them by 10 days before the election.

[redacted]

Updated: 03-28-2008

Registration Deadline — 21 days before the election.

6. ID Number. The last four digits of your Social Security number OR your New Jersey Driver's License number is required for voter registration. If you do not possess either of these identifications, please write "NONE" on the form. The State will assign a number that will serve to identify you for voter registration purposes.
7. Choice of Party. New Jersey's voter registration form does not provide a check-off for political party affiliation. A newly registered voter or voter who has never voted in a political party primary election can declare party affiliation at the polling place on the day of a primary election. In New Jersey, a primary election is only held for the Democratic and Republican parties. A voter may also file a

political party declaration form to become a member of a political party. If a declared voter wished to change party affiliation he or she must file a declaration form 50 days before the primary election, in order to vote.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New Jersey you must:
- be a citizen of the United States
- be at least 18 years of age by the time of the next election
- be a resident of this State and county at your address at least 30 days before the next election
- not be serving a sentence or on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States

Mailing address:
New Jersey Department of Law and Public Safety
Division of Elections
PO BOX 304
Trenton, NJ 08625-0304

[redacted]

Updated: 03-01-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your full social security number is required. This registration card containing your social security number will become part of the permanent voter registration records of your locality, which are open to inspection by the public in the office of the county clerk. However, your social security number and date of birth will remain confidential and will not be disclosed to the public. Computerized listings of limited voter registration information (without social security number or birth date) are available to the general public, and are furnished upon request to incumbent election officeholders, candidates, political parties, courts and non-profit organizations promoting voter participation and registration, for political purposes only (§1-5-19B, NMSA 1978).
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New Mexico you must:
- be a citizen of the United States
- be a resident of the State of New Mexico
- be 18 years of age at the time of the next election
- not have been denied the right to vote by a court of law by reason of mental incapacity and, if I have been convicted of a felony, I have completed all conditions of probation or parole, served the entirety of a sentence or have been granted a pardon by the Governor.

Mailing address:
Bureau of Elections
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

[redacted]

Updated: 03-01-2006

Registration Deadline — 25 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will be assigned to you by your State.
7. Choice of Party. You must enroll with a party if you want to vote in that party's primary election or caucus.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New York you must:
- be a citizen of the United States
- be a resident of the county, or of the City of New York, at least 30 days before an election
- be 18 years old by December 31 of the year in which you file this form (*Note:* You must be 18 years old by the date of the general, primary, or other election in which you want to vote)
- not be in jail or on parole for a felony conviction
- not currently be judged incompetent by order of a court of competent judicial authority
- not claim the right to vote elsewhere

Mailing address:
NYS Board of Elections
40 Steuben Street
Albany, NY 12207-2108

[redacted]

Updated: 03-01-2006

Registration Deadline — Postmarked 25 days before the election or received in the elections office or designated voter registration agency site by 5:00 p.m. 25 days before the election.

6. ID Number. Provide your North Carolina driver's license number, or North Carolina Department of Motor Vehicles ID number. If you do not have a driver's license, then list the last four digits of your social security number.
7. Choice of Party. You must register with a party to vote in that party's primary unless that party allows unaffiliated voters to vote in its primary. If you indicate a political party that is not a qualified party, or indicate no party, you will be listed as "Unaffiliated".
8. Race or Ethnic Group. You are required to fill in this box. However, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in North Carolina you must:
- be a citizen of the United States
- be a resident of North Carolina and the county in which you live for at least 30 days prior to the election
- be 18 years of age by the day of the next general election
- have your rights of citizenship restored if you have been convicted of a felony
- not be registered or vote in any other county or state

Mailing address:
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

[redacted]

Updated: 03-01-2006

North Dakota does not have voter registration.

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your social security number is requested. Providing this number is voluntary. This information allows the Board of Elections to verify your registration if necessary (O.R.C. 3503.14). [Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you don't have either number you will have to write "NONE" on the form and the State will assign you a number.]
7. Choice of Party. You do not register with a party if you want to take part in that party's primary election. Party affiliation is established by voting at a primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Ohio you must:
- be a citizen of the United States
- be a resident of Ohio
- be 18 years old on or before election day. If you will be 18 on or before the day of the general election, you may vote in the primary election for candidates only.
- not be convicted of a felony and currently incarcerated
- not be found incompetent by a court for purposes of voting

Mailing address:
Secretary of State of Ohio
Elections Division
180 E. Broad Street — 15th Floor
Columbus, OH 43215

[redacted]

Updated: 10-29-2003

Registration Deadline — 25 days before the election.

6. ID Number. The last four digits of your social security number are required. (Oklahoma Title 26, Section 4-112) In addition, your Oklahoma driver's license number is requested.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oklahoma you must:
- be a citizen of the United States and a resident of the State of Oklahoma
- be 18 years old on or before the date of the next election
- have not been convicted of a felony, for which a period of time equal to the original sentence has not expired, or for which you have not been pardoned
- not now be under judgment as an incapacitated person, or a partially incapacitated person prohibited from registering to vote

Mailing address:
Oklahoma State Election Board
Box 528800
Oklahoma City, OK 73152-8800

[redacted]

Updated: 03-01-2006

Registration Deadline — 21 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, you will need to write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oregon you must:
- be a citizen of the United States
- be a resident of Oregon
- be at least 18 years old by election day

Mailing address:
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before an election or primary.

6. ID Number. You must supply a Driver's License Number, if you have one. If you do not have a Driver's License Number, you must supply the last four digits of your social Security Number. If you do not have a Social Security Number, please write "NONE" in the box.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Pennsylvania you must:
- be a citizen of the United States at least one month before the next election
- be a resident of Pennsylvania and your election district at least 30 days before the election
- be at least 18 years of age on the day of the next election

Mailing address:
Office of the Secretary of the Commonwealth
210 North Office Bldg.
Harrisburg, PA 17120-0029

[redacted]

Updated: 03-28-2006

Registration Deadline — 30 days before the election.

6. ID Number. The applicant shall be required to provide his/her Rhode Island driver's license number if the applicant has been issued a current and valid Rhode Island driver's license. In the case of an applicant who has not been issued a current and valid driver's license he/she must provide the last four (4) digits of his/her social security number. An applicant, who has neither, will be assigned a unique identifying number by the State of Rhode Island.

7. Choice of Party. In Rhode Island, a person must register with a party if he/she wishes to take part in that party's primary election. A person who fails to register with a party at the time of registration may, if he/she chooses, register with a party on the day of that party's primary and take part in that party's primary election. If a person does not register with a party, he/she can still vote in general elections and non-partisan primary elections.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Rhode Island you must:
- be a citizen of the United States
- be a resident of Rhode Island for 30 days preceding the next election
- be 18 years old by election day
- not be currently incarcerated in a correctional facility due to a felony conviction
- not have been lawfully judged to be mentally incompetent

Mailing address:
Rhode Island State Board of Elections
50 Branch Ave.
Providence, RI 02904-2790

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is required by the South Carolina Code of Laws and is used for internal purposes only. Social security number does not appear on any report produced by the State Election Commission nor is it released to any unauthorized

individual. (South Carolina Title 7-5-170)
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box. Your application may be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in South Carolina you must:
- be a citizen of the United States
- be at least 18 years old on or before the next election
- be a resident of South Carolina, your county and precinct
- not be confined in any public prison resulting from a conviction of a crime
- never have been convicted of a felony or offense against the election laws, or if previously convicted, have served your entire sentence, including probation or parole, or have received a pardon for the conviction
- not be under a court order declaring you mentally incompetent
- claim the address on the application as your only legal place of residence and claim no other place as your legal residence

Mailing address:
State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

[redacted]

Updated: 03-01-2006

Registration Deadline — Received 15 days before the election.

6. ID Number. Your driver's license number is requested. If you do not have a valid driver's license, you must provide the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in South Dakota you must:
- be a citizen of the United States
- reside in South Dakota
- be 18 years old by the next election
- not be currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penitentiary system
- not have been adjudged mentally incompetent by a court

Mailing address:
Elections, Secretary of State
500 E. Capitol
Pierre, SD 57501-5070

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. Social security number, if any, is required for purposes of identification and to avoid duplicate registration (TCA 2.2.116).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Optional.

9. Signature. To register in Tennessee you must:
- be a citizen of the United States
- be a resident of Tennessee
- be at least 18 years old on or before the next election
- not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)
- not be adjudicated incompetent by a court of competent jurisdiction (or have been restored to legal capacity)

Mailing address:
Coordinator of Elections
Tennessee Tower, Ninth Floor
312 Eighth Avenue, North
Nashville, TN 37243

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Texas you must:
- be a citizen of the United States

- be a resident of the county in which the application for registration is made
- be at least 17 years and 10 months old (you must be 18 to vote)
- not be finally convicted of a felony, or if a convicted felon, you must have fully discharged your punishment, including any incarceration, parole, supervision, period of probation or be pardoned.
- have not been declared mentally incompetent by final judgment of a court of law

Mailing address:
Office of the Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

[redacted]

Updated: 03-28-2008

Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk's office.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Declaring a party is not required in order to register to vote. However, Utah's election law allows each political party to choose whom it will allow to vote in its primary election. If you do not affiliate with a party, you may be restricted from voting in the primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Utah you must:
- be a citizen of the United States
- have resided in Utah for 30 days immediately before the next election
- be at least 18 years old on or before the next election
- not be a convicted felon currently incarcerated for commission of a felony
- not be convicted of treason or crime against the elective franchise, unless restored to civil rights
- not be found to be mentally incompetent by a court of law

Mailing address:
Office of the Lieutenant Governor
P.O. Box 142325
Salt Lake City, UT 84114

[redacted]

Updated: 07-29-2008

Registration Deadline — Delivered to the town clerk before 5:00 PM on the Wednesday before the election.

6. ID Number. You must provide your Vermont Driver's license number, or if none, the last 4 digits of your Social Security number. If you do not have a Vermont Driver's license or a Social Security number, please write "NONE" on the form. The Secretary of State's office will assign you a unique identifying number.
7. Choice of Party. Vermont does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Vermont you must:
- be a citizen of the United States
- be a resident of Vermont
- be 18 years of age on or before election day
- have taken the following Oath: You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person [Voter's Oath, Vermont Constitution, Chapter II, Section 42]

By signing in Box 9, you are attesting that you have sworn or affirmed the Vermont voter's oath as printed above.

Mailing address:
Office of the Secretary of State
Director of Elections
26 Terrace Street
Montpelier, VT 05609-1101

[redacted]

Updated: 11-10-2010

Registration Deadline — Delivered 29 days before the election.

6. ID Number. Your full social security number is required. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.

Article II, §2, Constitution of Virginia (1971).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Virginia you must:
- be a citizen of the United States
- be a resident of Virginia and of the precinct in which you want to vote
- be 18 years old by the next May or November general election
- not have been convicted of a felony, or have had your civil rights restored
- not currently be declared mentally incompetent by a court of law

Mailing address:
State Board of Elections
1100 Bank Street, 1st Floor
Richmond, VA 23219

[redacted]

Updated: 10-29-2003

Registration Deadline — 30 days before the election (or delivered in-person to the local voter registration office 15 days before the election).

6. ID Number. You must provide your driver's license number. If you do not have a Washington driver's license, you must provide the last four digits of your Social Security Number. Failure to provide this information may prevent your registration from being processed.
7. Choice of Party. You are not required to designate your party affiliation to register in Washington.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Washington you must:
- be a citizen of the United States
- be a legal resident of Washington State, your county and precinct for 30 days immediately preceding the election in which you want to vote
- be at least 18 years old by election day
- not be convicted of infamous crime, unless restored to civil rights

Mailing address:
Secretary of State
Voter Registration by Mail
P.O. Box 40230
Olympia, WA 98504-0230

[redacted]

Updated: 09-12-2006

Registration Deadline — 21 days before the election.

6. ID Number. Enter your driver's license number. If you do not have a driver's license number, enter the last four numbers of your social security number. If you do not have a driver's license number or a social security number, an identification number will be assigned to you.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless you request the ballot of a party which allows independents to vote)
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in West Virginia you must:
- be a citizen of the United States
- live in West Virginia at the above address
- be 18 years old, or to vote in the primary be 17 years old and turning 18 before the general election
- not be under conviction, probation, or parole for a felony, treason or election bribery
- not have been judged "mentally incompetent" in a court of competent jurisdiction

Mailing address:
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

[redacted]

Updated: 09-12-2006

Registration Deadline — Twenty (20) days before the election (or completed in the local voter registration office up to 5:00 pm. 1 day before the election, or completed at the polling place on election day).

6. ID Number. Provide your driver's license number, if you have no current and valid driver's license, the last 4 digits of your social security number or DOT-issued ID card number.
7. Choice of Party. Not required.
8. Race or Ethnic Group. Not required.
9. Signature. To register in Wisconsin you must:
- be a citizen of the United States
- be a resident of Wisconsin for at least 10 days
- be 18 years old
- not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored

- not have been found by a court to be incapable of understanding the objective of the electoral process
- not make or benefit from a bet or wage depending on the result of an election
- not have voted at any other location, if registering on election day

Mailing address:
State Elections Board
17 West Main Street, Suite 310
P.O. Box 2973
Madison, WI 53701-2973

[redacted]

Updated: 03-01-2006

Wyoming by law, cannot accept this form unless State law is changed.

ARIZONA VOTER REGISTRATION FORM
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA
INSTRUCCIONES EN ESPAÑOL SE ENCUENTRAN AL REVERSO

Questions? For questions regarding voter registration, call your County Recorder listed on the back of the form

You Can Use This Form To:
- Register to vote in the state of Arizona
- Let us know that your name, address or party affiliation has changed

To Register To Vote In Arizona You Must (Qualifications):
- Be a United States citizen (see citizenship requirements on back)
- Be a resident of Arizona and the county listed on your registration
- Be 18 years of age or more on or before the day of the next regular General Election

You Cannot Register To Vote In Arizona If:
- You have been convicted of a felony and have not yet had your civil rights restored
- You have been adjudicated incompetent

How To Register To Vote:
- You can mail or hand deliver your completed form to your County Recorder's office
- Your County Recorder's office will mail you a proof of registration within 4 – 6 weeks
- Your decision to register to vote or not, and where you submitted your registration, will remain confidential

Registration Received By Mail:
- In the case of registration by mail, a voter registration is valid if it complies with either of the following:
  1. The registration is dated 29 days or more before an election and is received by the County Recorder by first class mail within 5 days after the last day to register to vote in that election.
  2. The form is postmarked 29 days or more before an election and is received by the County Recorder by 7 p.m. on the day of that election.

NEW REGISTRATION REQUIREMENTS

1. Your completed voter registration form must contain your Arizona driver license or nonoperating identification license number.
   If you do not have either of these licenses, you must include the last four digits of your social security number.
   If you do not have a driver license or nonoperating identification license or a social security number, a unique identifying number will be assigned by the Secretary of State.
2. A complete voter registration form must also contain proof of citizenship or the form will be rejected.
   If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, this will serve as proof of citizenship. If not, you must enclose proof of citizenship with the form.
   The back of the form contains a list of acceptable documents to establish your citizenship and instructions on how to include copies of the documents with the voter registration form.

Citizens With Disabilities Rights:
- Contact the County Recorder/Elections Department for information about early voting or any voting accommodations.

If you are not a citizen of the United States or will not be 18 by the next General Election, do not complete this form.

Fold Line

*USE BLACK PEN – COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA – LLENE EL FORMULARIO COMPLETAMENTE

Fold Line

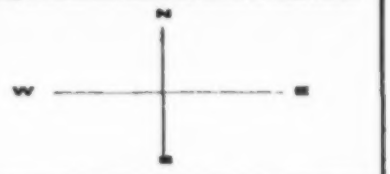
[1] Are you registered to vote at another address? Yes☐ No☐ Not Sure☐ List the former address, including county and state			BOX FOR OFFICE USE ONLY 8
[2] Last Name	First Name	Middle Name	Jr./Sr./III
[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.			[4] Apt./Unit/Space No.
[5] City	[6] County	[7] Zip	[8] Address where you get your mail, if mail is not delivered to your home
[9] Birth Date (Month/Day/Year)	[10] State or Country of Birth	[11] Telephone number	[12] Father's name or mother's maiden name
[13] AZ Driver license number or AZ Nonoperating license number	[14] Last four digits of social security number	[15] Optional Tribal Identification Number	
[16] Specify Party Preference	[17] Occupation	[18] If your name was different the last time you registered, list former name	[19] Alien Registration Number

[20] Will you be willing to work at a polling place on election day? Yes☐ No☐

[21] ● Are you a citizen of the United States of America? Yes☐ No☐
● Will you be 18 years of age on or before election day? Yes☐ No☐

If you checked "No" to either one of these questions, do not submit this form.

[22] If no street address draw a map here:



VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

X
SIGN HERE DATE

[23] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.

SIGNATURE OF PERSON ASSISTING DATE

Remove tape and fold to mail

Remove tape and fold to mail

ARIZONA VOTER REGISTRATION FORM (Translation)
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA

¿Preguntas? Para preguntas con respecto a la inscripción de votante, llame a su Registrador del Condado indicado al reverso del formulario

Usted puede usar este formulario para:
- Inscribirse para votar en Arizona
- Informarnos que su nombre, dirección o afiliación de partido ha cambiado

Para inscribirse para votar en Arizona, usted tiene que (Requisitos):
- Ser ciudadano de los Estados Unidos (vea los requisitos de la prueba de ciudadanía al reverso)
- Ser residente de Arizona y del condado indicado en su inscripción
- Tener 18 años o más en o antes del día de la próxima Elección General normal

ADVERTENCIA: El efectuar una inscripción falsa es un delito grave de clase 6.

Usted no puede inscribirse para votar en Arizona si:
- Usted ha sido condenado de un delito grave y todavía no se le han restituido sus derechos civiles
- Usted ha sido juzgado incompetente

Cómo inscribirse para votar:
- Usted puede enviar por correo su formulario llenado a la oficina de su Registrador del Condado o entregarlo personalmente.
- La oficina de su Registrador del Condado le enviará por correo una prueba de inscripción dentro de 4 a 6 semanas.
- Su decisión de inscribirse para votar o no inscribirse, y donde usted presentó su inscripción, es quedará confidencial.

Inscripciones rechazadas por correo:
- En caso de inscripción por correo, una inscripción de votante es válida si cumple con cualquiera de los siguientes:
  1. El formulario de registro está fechado 29 ó más días antes de una elección, y es recibido por el Registrador del Condado por correo de primera clase dentro de cinco días después del último día para registrarse para votar en esa elección.
  2. El formulario tiene la fecha de matasellos de 29 días o más antes de una elección y es recibido por el Registrador del Condado para las 7 p.m. del día de esa elección.

NUEVOS REQUISITOS DE INSCRIPCIÓN

1. Su formulario lleno de registro electoral debe contar con su número de licencia de manejo o de identificación (no de manejo) de Arizona.

Si no tiene ninguna de estas licencias, tiene que incluir los últimos cuatro dígitos de su número de seguro social.

Si no tiene una licencia de manejar ni una licencia de identificación no de manejar ni un número de seguro social, se le asignará un número único de identificación por la Secretaría de Estado.

2. Un formulario lleno de inscripción de votante también tiene que contener prueba de ciudadanía o se rechazará el formulario.

Si usted tiene una licencia de manejar o una licencia de identificación no de manejar expedida después del 1 de octubre de 1996, ésta servirá como prueba de ciudadanía. Si no, tiene que adjuntar prueba de ciudadanía con el formulario.

El reverso del formulario contiene una lista de documentos aceptables para establecer su ciudadanía e instrucciones sobre cómo incluir copias de los documentos con el formulario de registro electoral.

Los ciudadanos con discapacidades pueden:
- Comuníquese con el Registrador del Condado/Departamento Electoral para información sobre la votación temprana o cualquier adaptación para votar.

Si usted no es ciudadano de los Estados Unidos o no tendrá 18 años para la próxima Elección General, no llene este formulario.

PLACE STAMP HERE

_____

_____

_____

EJEMPLAR

Voter Receipt
Recibo del Votante

<Línea de doble — Línea de doble>

– USE ESTA SECCIÓN COMO EJEMPLO, LLENE LA CARA DEL FORMULARIO –

[1] ¿Está usted inscrito para votar en otra dirección? Sí☐ No☐ No sé☐
Escriba la dirección anterior, incluyendo el condado y el estado

CASILLA SÓLO PARA EL USO DE LA OFICINA
S

[2] Apellido | Nombre de pila | Segundo nombre | Jr./Sr./III

[3] Si no hay calle en el domicilio, describa la ubicación de la residencia usando millaje, cruceros de calles, # de parcela, nombre de la subdivisión y lote, o detalles específicos de referencia. No use un apartado postal ni dirección de negocio. Dibuje un mapa abajo si está ubicado en una zona rural.

[4] Dpto./Unidad/No. de espacio

[5] Ciudad | [6] Condado | [7] Código postal | [8] Dirección en la cual Ud. recibe su correspondencia, si no se entrega la correspondencia a su casa

[9] Fecha de nacimiento (Mes/Día/Año) | [10] Estado o País de nacimiento | [11] Número de teléfono | [12] Nombre de su padre o nombre de soltera de su madre

[13] Número de su licencia de manejar de AZ o número de su licencia de identificación no de manejar de AZ | [14] Los últimos cuatro cifras de su número de seguro social | [15] Número Nacional de Identificación Tribal

[16] Especifique su Partido de Preferencia | [17] Ocupación | [18] Si su nombre ha cambiado desde la última vez que se inscribió, escriba su nombre anterior | [19] Número de Registro de Extranjero

[20] ¿Estará usted dispuesto a trabajar en un lugar de votación el día de la elección? Sí☐ No☐

[21] ● Es usted ciudadano de los Estados Unidos de América? Sí☐ No☐
● Tendrá usted 18 años de edad en o antes del día de la Elección? Sí☐ No☐
Si marcó "No" a cualquiera de estas preguntas, no presente el formulario.

DECLARACIÓN DE VOTANTE – Al firmar abajo, juro o afirmo que la información más arriba es verdad, que soy RESIDENTE de Arizona, que NO soy un CRIMINAL convicto, o mis derechos civiles están restituidos y no se me ha juzgado INCOMPETENTE.

X
FIRME AQUÍ _____ FECHA

[22] Si usted no puede firmar el formulario, se puede llenar bajo su dirección. La persona que le ayudó tiene que firmar aquí.
FIRMA DE LA PERSONA QUE AYUDA _____ FECHA _____

[23] Si no hay una dirección de calle, dibuje un mapa aquí:

N
O E
S

<DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO — DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO>
<Fold Line — Fold Line>

*USE BLACK PEN – COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA – LLENE EL FORMULARIO COMPLETAMENTE

[1] Are you registered to vote at another address? Yes☐ No☐ Not Sure☐
List the former address, including county and state

BOX FOR OFFICE USE ONLY
S

[2] Last Name | First Name | Middle Name | Jr./Sr./III

[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.

[4] Apt./Unit/Space No.

[5] City | [6] County | [7] Zip | [8] Mailing address if not your mail. *If mail is not delivered to your home*

[9] Birth Date (Month/Day/Year) | [10] Place of Birth | [11] Telephone number | [12] Father's name or mother's maiden name

[13] AZ Driver license number or AZ Nonoperating license number | [14] Last Name of Mother | [15] Optional Tribal Identification Number

[16] Specify Party Preference | [17] Occupation | [18] If your name was different the last time you registered, let us know | [19] Alien Registration Number

[20] Will you be willing to work at a polling place on election day? Yes☐ No☐

[21] ● Are you a citizen of the United States of America? Yes☐ No☐
● Will you be 18 years of age on or before election day? Yes☐ No☐
If you checked "No" to either one of these questions, do not submit this form.

VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

X
SIGN HERE _____ DATE _____

[22] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.
SIGNATURE OF PERSON ASSISTING _____ DATE _____

[23] If no street address draw a map here:

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W E
S

<Remove tape and fold to mail — Remove tape and fold to mail>

VOTER REGISTRATION FORM - FORMULARIO DE INSCRIPCIÓN DE VOTANTE

VOTER REGISTRATION INFORMATION

If you meet the qualifications listed on the front of this form, complete, sign and return the attached registration form to the County Recorder for your county listed below. The form may be mailed or returned to a person designated to receive voter registration forms. *Call your County Recorder for more information.*

NEW REGISTRATION REQUIREMENTS

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, write the number in box 13 on the front of this form. This will serve as proof of citizenship and no additional documents are needed. If not, you must include proof of citizenship with the form. Only one form of proof is needed to register to vote.

The following is a list of acceptable documents to establish your citizenship:

- A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your current legal name.
- A legible photocopy of the pertinent pages of your passport
- Presentation to the County Recorder of U.S. naturalization documents or fill in your Alien Registration Number in box 19
- Your Indian Census Number, Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal Enrollment Number in box 18
- A legible photocopy of your Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.

If you need to include a photocopy of proof of citizenship, please fold the proof along with the voter registration form and place both items in an envelope and mail them to your County Recorder listed below. Do not send original documents. Photocopies will not be returned to you. Please visit azsos.gov/elections.pdf if you have any questions regarding acceptable types of proof of citizenship.

If you are registered in Arizona and use this registration form because you moved within a county, changed your name, or changed your political party affiliation, you do not need to provide photocopies of proof of citizenship. If you move to a different Arizona county, you will need to provide proof of citizenship.

ACCOMMODATIONS FOR INDIVIDUALS WITH DISABILITIES

Alternative format materials, sign language interpretation, and assistive hearing devices are available upon request to your County Recorder. At the polls, additional materials and accommodations will be made available within the time constraints of the request.

GENERAL INFORMATION

1. You must re-register whenever you move, change your name, or change your political party affiliation.
2. Early ballots may be requested from the County Recorder of your county of residence.
3. Keep this copy as your receipt. After the County Recorder receives your registration and places it in the county general register, a notice will be sent to you within 4–6 weeks indicating that your name appears on the register. If you do not receive your notice contact your County Recorder.
4. Fill in your political party preference in box 16. If you leave this box blank as a first time registrant in your county, your party preference will be "Party Not Designated". If you leave this box blank and you are already registered in the county, your current party preference will be retained. Please write full name of party preference in box.

INFORMACIÓN PARA LA INSCRIPCIÓN DE VOTANTE

"Si usted satisface los requisitos indicados en la cara de este formulario, llene, firme y regrese la forma adjunta de registro al Registrador del Condado de su condado listado abajo. La forma puede enviarse por correo o regresarse a una persona designada para recibir formas de registro electoral. *Llame al Registrador de su Condado para más información".*

REQUISITOS DE UNA NUEVA INSCRIPCIÓN

Si esta es su primera vez de inscribirse para votar en Arizona, o si se ha mudado a otro condado, su formulario de inscripción de votante también tiene que incluir prueba de ciudadanía o no rechazará el formulario. Si usted tiene una licencia de manejar de Arizona, o una licencia de identificación no de manejar de Arizona, expedida después del 1 de octubre de 1996, escriba el número en la casilla 13 en la cara de este formulario. Esto servirá como prueba de ciudadanía y no se necesitan ningunos otros documentos. Si no, usted debe incluir prueba de ciudadanía con la forma. Sólo se necesita una forma de comprobación para registrarse para votar.

Lo siguiente es una lista de los documentos aceptables para establecer su ciudadanía:

- Una fotocopia legible de un acta de nacimiento que verifique la ciudadanía y la documentación legal corroborativa (ej. Acta de Matrimonio) si el nombre en el acta de nacimiento no es el mismo como su nombre legal actual.
- Una fotocopia legible de las páginas pertinentes de su pasaporte
- Presentación al Registrador del Condado de documentos de naturalización de los Estados Unidos o anote su Número de Registro de Extranjero en la casilla 19
- Su Número de Tarjeta de la Oficina de Asuntos de Nativo Americanos, Número de Tarjeta de Tratado Tribal, o Número de Matrícula Tribal en la casilla 18
- Una fotocopia legible de su Certificado Tribal de Sangre Nativo Americana o affidávit de Nacimiento de la Oficina de Asuntos de Nativo Americanos.

Si usted necesita incluir una fotocopia de pruebe de ciudadanía, por favor doble la prueba junto con la forma de registro electoral, coloque ambos artículos en un sobre, y envíelos a su Registrador del Condado listado abajo. No envíe documentos originales. Las fotocopias no se le regresarán. Por favor visite azsos.gov/elections.pdf si tiene usted cualquier pregunta relacionada con tipos aceptables para comprobar su ciudadanía.

Si usted está registrado en Arizona y usa el formulario de registro debido a que se mudó dentro de un condado, cambió su nombre, o cambió su afiliación de partido político, no necesita proveer fotocopias de su prueba de ciudadanía. Si cambia a un condado distinto en Arizona, necesitará proveer prueba de ciudadanía.

PARA ACOMODAR A LAS NECESIDADES DE LAS PERSONAS CON DISCAPACIDADES

Los materiales en formatos alternativos, interpretación por señas y dispositivos de audición asistida están disponibles al dar aviso previo de 72 horas a su Registrador del Condado. Al punto posible, se harán disponibles más acomodamientos razonables dentro de las limitaciones de tiempo de la solicitud.

INFORMACIÓN GENERAL

1. Usted debe volver a registrarse cuando se mude, cambie su nombre, o cambie de afiliación de partido político.
2. Se puede solicitar boletas electorales tempranas del Registrador del Condado del condado de su residencia.
3. Conserve esta copia como su recibo. Después de que el Registrador del Condado reciba su inscripción y la anote en el registro general del condado, se le enviará un aviso dentro de 4 a 6 semanas que indica que su nombre aparece en el registro. Si usted no recibe su aviso, póngase en contacto con su Registrador del Condado.
4. Anote su preferencia de partido político en la casilla 16. Si usted deja esta casilla en blanco al registrarse por primera vez en su condado, su preferencia de partido será "No Designará Partido". Si usted deja esta casilla en blanco y ya se registró en el condado, se retendrá su preferencia actual de partido. Por favor anote el nombre completo del partido político en la casilla.

Apache County Recorder
(928) 337-7515 (TDD# 337-4403)

Cochise County Recorder
(520) 432-8284 (TDD# 432-8290)

Coconino County Recorder
(928) 779-6559 (TDD# 226-4075)

Gila County Recorder
(928) 425-3231 (TDD# 425-0636)

Graham County Recorder
(928) 428-3250 (TDD# 428-3562)

Greenlee County Recorder
(928) 865-2632 (TDD# 865-3832)

La Paz County Recorder
(928) 669-6136 (TDD# 669-6400)

Maricopa County Recorder
(602) 506-1511 (TDD# 506-3348)

Mohave County Recorder
(928) 753-0767 (TDD# 753-0769)

Navajo County Recorder
(928) 524-4188 (TDD# 524-4284)

Pima County Recorder
(520) 740-4330 (TDD# 740-4330)

Pinal County Recorder
(520) 868-6650 (TDD# 868-6661)

Santa Cruz County Recorder
(520) 376-7660 (TDD# 761-7816)

Yavapai County Recorder
(928) 771-3248 (TDD# 771-3620)

Yuma County Recorder
(928) 373-6084 (TDD# 373-6033)

State of Arizona
Secretary of State
Rev. 04/2007

Chief Judge KOZINSKI, concurring:

I find this a difficult and perplexing case. The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form. This wouldn't render the federal form superfluous, just as redundant braking systems on cars and secondary power supplies on computers aren't superfluous. This is known colloquially as wearing a belt and suspenders, and is widely used to safeguard against failure of critical systems (i.e., getting caught with your pants down). *See Redundancy (engineering)*, Wikipedia, http://goo.gl/ce8il (last visited Jan. 9, 2012).

The two constructions embody different, and somewhat antithetical, policies. The narrow construction maximizes federal control and national uniformity at the expense of state autonomy and local control. The broad construction defers to state and local interests while sacrificing national uniformity. As a linguistic matter, neither construction of "accept and use" strikes me as superior.

If Congress had made it clear that states must accept the federal form as a complete application, or that they need not, I would cheerfully enforce either command. But Congress used tantalizingly vague language, which would make it very useful to fall back on a rule of construction, such as the Clear Statement Rule or the Presumption Against Preemption. Judge Ikuta is right, however, that the Supreme Court has so far adopted such rules only for Supremacy Clause cases, not for those arising under the Elections Clause. *See* maj. op. at 4127-29.

There would, I believe, be ample justification for adopting such rules for Elections Clause preemption. While the federal government has an interest in how elections for federal office are conducted, the states are not disinterested bystanders. Federal elections determine who will represent the state and its citizens in Congress, the White House and, indirectly, the federal courts. Making sure that those representatives are chosen by the state's qualified electors is of vital significance to the state and its people. Moreover, the federal government is commandeering the state's resources, giving states a significant stake in ensuring that the process is conducted efficiently and fairly. Rightly or wrongly, many still blame (or credit) voting irregularities in Illinois for John F. Kennedy's election as President in 1960, and in Texas for Lyndon Johnson's election to the Senate in 1948. States have an interest in ensuring that their reputations aren't soiled in this fashion for decades, maybe longer. The risk of fraud and other malfeasance may

depend on local conditions and thus differ from state to state. States with a tradition of electoral chicanery, or with large transient populations, may need to impose stricter controls to ensure the integrity of their voting processes.

The fact remains that the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause. This may be because it hasn't had occasion to do so in modern times. *Foster v. Love*, 522 U.S. 67 (1997), was an easy case where the state's election scheme directly contradicted the constitutional text, while the state's interest in avoiding a general election on the same day as the rest of the country was slight. A case such as ours, where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests. But only the Supreme Court can adopt such a doctrine.

In the absence of something better, I must resort to secondary aids to construction. In this case, we have legislative history that supports reading "accept and use" in the exclusive sense, which would preclude states from seeking additional documentation. Senator Simpson proposed amending the bill that eventually became the NVRA to provide that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (Mar. 16, 1993). He explained his

purpose: "It allows States to check documents to verify citizenship. . . . [I]t simply makes clear that this bill must not be interpreted to stop any particular State from requiring documents. This includes States which currently by State law check documents, as well as those who may wish to check documents in the future. . . . I offer my amendment to try to ensure that States will continue to have the right, if they wish, to require documents verifying citizenship. . . ." *Id.* at 5098-99. Senator Simpson understood that "accept and use" could be read narrowly to preclude states from seeking documentation beyond the federal form, and offered his amendment to ensure that the phrase would be construed in the broad, inclusive sense.

Senator Ford, the NVRA's sponsor, responded: "[T]here is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship. I think basically this is redundant, even though you probably put it in a section. But there is nothing in there now that would preclude it." *Id.* at 5099. Senator Ford seemed to believe that "accept and use" was already being used in the inclusive sense, and was amenable to adding language that would confirm this.

The Senate adopted the Simpson amendment, but the House bill lacked a similar provision. The Conference Committee adopted the House version, explaining that "[t]he conferees agree with the House bill and do not include this provision from the Senate amendment. It is not necessary or consistent with the

purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well. . . . These concerns lead the conferees to conclude that this section should be deleted." H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49 (Conf. Rep.). The conferees thus rejected the Simpson amendment, not because they thought it superfluous (as did Senator Ford) but because the inclusive meaning of "accept and use" was inconsistent with their vision of how the Act should operate.

After the conference, the Senate re-passed the NVRA without the Simpson amendment. S. Rep. No. 103-6, at 12-13 (1993). A minority of senators opposed the bill in part because they thought "requiring proof of citizenship" would be helpful in combating fraud and worried that the bill "would preclude such corrective action." *Id.* at 50.

In the House, some members sought to recommit the bill in order to tack on a Simpson-like amendment. They argued that failure to do so would encourage voter fraud. *See* 139 Cong. Rec. at 9228 (May 5, 1993) (Rep. Livingson: "Without this provision, this bill is an auto-fraudo bill."); *id.* at 9229 (Rep. Cox: "Despite its benign name, this pernicious bill would make it nearly impossible to prevent ineligible people

– including illegal aliens – from voting."). Their arguments fell on deaf ears. *Id.* at 9231.

The Supreme Court has warned us time and again not to rely on legislative history in interpreting statutes, largely because of the ease with which floor statements and committee reports can be manipulated to create a false impression as to what the body as a whole meant. But the history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists. The Court has recognized that such drafting history *can* offer interpretive insight: "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006). While the dissenting Justices in *Hamdan* objected to the use of legislative history, their objection rested in large part on the fact that it was being used to defeat clear statutory language. *See id.* at 665-68 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). I'm not convinced they would object with equal vigor where, as here, the statutory language is in equipoise and both chambers affirmatively rejected efforts to authorize precisely what Arizona is seeking to do.

The dissent mistakenly sees some inconsistency between my conclusion today and that in my "well-drafted dissent to the original panel opinion." Dissent at 4211 n.1. But, as a member of a three-judge panel, I had no occasion to construe the statute de novo because we were bound by the law of the circuit and

the law of the case. *Gonzalez v. Arizona*, 624 F.3d 1162, 1198-99 (9th Cir. 2010) (Kozinski, C.J., dissenting in large part). To the extent I could reach the issue at all, it was only to determine whether "*Gonzalez I* is clearly wrong." *Id.* at 1208. Because I concluded then, as I do now, that "both preemptive and non-preemptive constructions of 'accept' and 'use' are plausible," I deferred to the earlier panel's construction. *Id.* at 1206. As an en banc court, we cannot defer to *Gonzalez I*. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I believe the preemptive reading of the statute is somewhat better than the alternative.

BERZON, Circuit Judge, concurring, with whom MURGUIA, Circuit Judge, joins:

I fully concur in the majority opinion but note the following: With respect to whether Proposition 200's polling place provision "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" in violation of § 2(a) of the VRA, 42 U.S.C. § 1973(a), the court holds only that the *current record* is insufficient to show a "causal connection between the challenged voting practice and [a] prohibited discriminatory result," *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (alteration in original) (internal quotation marks omitted). I concur in Section III.A of the majority

opinion with that understanding of its limited reach. A different record in a future case could produce a different outcome with regard to the § 2 causation question.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Proposition 200's registration provision violates the National Voter Registration Act ("NVRA"). *See* Maj. Op. at 4148. I part ways with the majority, however, when it comes to Proposition 200's requirement that voters provide identification at the polls ("the polling place provision"). The majority concludes that Gonzalez's challenge to the polling place provision under Section 2 of the Voting Rights Act fails because Gonzalez has not established that the polling place provision "results in discrimination on account of race." Maj. Op. at 4151. I respectfully disagree with the majority, for two reasons.

First, in concluding that Proposition 200's polling place provision does not disparately impact Latino voters, the majority conflates statistics on Proposition 200's *registration provision* with Proposition 200's *polling place provision*. *See* Maj. Op. at 4152-53. A thorough review of the record reveals that Proposition 200's *polling place provision* has a significant disproportionate impact on Latino voters. In the 2006 general election, Latino voters comprised between 2.6% and 4.2% of the voters who turned out to vote,

but Latino voters cast 10.3% of the ballots that went uncounted because of insufficient identification. Latino voters were overrepresented by 200% to 500% in ballots that were uncounted because of insufficient identification.

Second, the majority mistakenly gives short shrift to the "Senate Factors" from *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).[1] In discussing these factors, the majority acknowledges that Latino voters have "suffered a history of discrimination in Arizona that hindered their ability to participate in the

---

[1] In *Gingles* the Supreme Court held that a court should consider the following factors, commonly referred to as the "Senate Factors," in determining whether a plaintiff has established a violation of Section 2 of the Voting Rights Act:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44-45.

political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting." Maj. Op. at 4152. Despite acknowledging these facts, the majority concludes that Proposition 200's polling place provision does not result "in discrimination on account of race." Maj. Op. at 4151. But a proper Section 2 analysis requires that we "consider how the challenged practice 'interacts with social and historical conditions'" to cause an inequality in the opportunities of Latino voters to cast their ballots. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) (quoting *Gingles*, 478 U.S. at 47).

Indeed, as the district court recounted in much detail, *de jure* discrimination against Latinos in Arizona existed during most of the twentieth century. Just prior to 1910, Arizona voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English speakers from voting in state elections. As late as the 1960s, these literacy requirements were a precondition for voting in Arizona.

After Arizona attained statehood in 1912, the new state government engaged in an anti-immigrant campaign characterized by a series of proposals aimed at restricting the political rights of Mexican immigrants' and limiting their right to work. The new Arizona constitution restricted non-citizens from working on public projects. In 1914, the Arizona legislature enacted the "eighty percent law," which stated that eighty percent of the employees in businesses

that had five or more employees had to be "native-born citizens of the United States."

Segregation of Latinos in housing and public accommodations was also common in Arizona during most of the twentieth century. In the years immediately following World War II, the city of Phoenix segregated Latino veterans in separate housing units. Movie theaters, restaurants, and stores frequently excluded Latinos or required Latinos to sit in segregated areas. Public parks and swimming pools were also segregated. A particularly notorious example of this segregation occurred in Tempe, where Latinos were only permitted to use the public swimming pool the day before the pool was drained.

In my view, statistics showing that Proposition 200's polling place provision disparately impact Latino voters, when coupled with Arizona's long history of discrimination against Latinos, current socio-economic disparities between Latinos and whites in Arizona, and racially polarized voting in Arizona, establish that Proposition 200's polling place provision results in discrimination on account of race.

History has also shown that when a Latino voter approaches the polling place but is stopped by a person perceived to be an authority figure checking for identification, there's something intimidating about that experience that evokes fear of discrimination. This intimidation has the effect of keeping Latino voters away from the polls.

In sum, I would hold that Proposition 200's polling place provision results in discrimination on account of race, in violation of Section 2 of the Voting Rights Act.

RAWLINSON, Circuit Judge, joined by Judge N.R. SMITH, concurring in part and dissenting in part:

I concur in the majority's conclusion that Arizona's Proposition 200, which amended Ariz. Rev. Stat. § 16-579 to require proof of identification prior to receiving a ballot, does not violate the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment. I also agree that the statutory amendment did not constitute a poll tax as proscribed in the Twenty-fourth Amendment to the United States Constitution. As a result, I join Part III of the majority opinion.

I respectfully dissent from the balance of the majority opinion, because I am not persuaded that application of Proposition 200's proof-of-citizenship provision to prospective voters using the National Mail Voter Registration Form (the Federal Form) is precluded by the National Voting Rights Act (NVRA). In my view, there is no conflict between the NVRA and Arizona's proof-of-citizenship requirement. In fact, the plain text of the NVRA validates Arizona's proof-of-citizenship requirement, even while recognizing that Arizona must "accept and use" the Federal Form.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-71

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF ARIZONA, et al.,

Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE OF INTER TRIBAL COUNCIL OF ARIZONA, INC., ARIZONA ADVOCACY NETWORK, STEVE M. GALLARDO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, LEAGUE OF WOMEN VOTERS OF ARIZONA, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND HOPI TRIBE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and People for the American Way Foundation are nongovernmental corporations. They have no parent organizations and no stock.

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SUMMARY OF ARGUMENT

Respondents Inter Tribal Council of Arizona, Inc., et al. ("Respondents," "ITCA Respondents," or "ITCA Plaintiffs") file this response in opposition to Arizona's Petition for Writ of Certiorari.

Arizona's previous application to this Court for a stay of the Ninth Circuit's mandate required Arizona to show that the Court would likely grant a writ of certiorari, and that there was at least a fair prospect that the Court would find the Ninth Circuit's decision erroneous. The Court denied Arizona's application, with no indication that the stay had been denied for any reason other than Arizona's failure to make those showings. *Arizona v. Abeytia*, No. 11A1189, 2012 U.S. LEXIS 4878 at *1 (U.S. June 28, 2012).

Arizona's Petition for Writ of Certiorari provides no persuasive new reason to grant certiorari. Arizona now argues that the Ninth Circuit applied a new, heightened standard for Elections Clause preemption because its analysis did not employ Supremacy Clause principles, such as the plain statement rule and the presumption against preemption. (Pet. App. i, 15). Arizona's petition, however, fails to cite a single federal court decision that applied either the plain statement rule or the presumption against preemption to an Elections Clause preemption analysis, and it fails to recognize that not one of the ten judges

sitting *en banc* found those principles applicable to this case. (Pet. App. 1c-122c) (*Gonzalez III*).

The Ninth Circuit carefully examined the text of the Constitution, followed this Court's Elections Clause cases, and correctly concluded that the standards for conducting a preemption analysis under the Elections Clause are less deferential to states than the standards for conducting a preemption analysis under the Supremacy Clause. This distinction, long reflected in this Court's decisions, derives from the fact that the Elections Clause specifically assigns the federal government the power to regulate federal elections, including the authority to negate or alter any state law involving federal elections. As a result, State authority to regulate federal elections is subordinate to Congressional regulation. In contrast, a Supremacy Clause preemption analysis requires additional considerations so as to balance federal authority with the police power reserved to the States under the Tenth Amendment.

Beyond its unsupported assertion that the Ninth Circuit applied an incorrect standard to its preemption analysis under the Elections Clause, Arizona's argument is little more than a claim that the Ninth Circuit interpreted the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq.* (Pet. App. 1h-28h), incorrectly. In a meticulous opinion written by Judge Ikuta and joined by all but two members of the ten-member *en banc* panel, the Ninth Circuit

found that Arizona Rev. Stat. § 16-166(F) – which requires that county recorders "reject" any and all voter registration applications, including those using the National Mail Voter Registration Form (the "Federal Form"), that are not accompanied by the Arizona requirements of documentary proof of citizenship – conflicts with the NVRA requirement that a state must "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4 (Pet. App. 7h). Justice O'Connor reached the same determination as part of the majority on the preceding three-judge panel. (Pet. App. 1a-106a) (*Gonzalez II*). The Ninth Circuit's conclusion that these federal and state provisions conflict is straightforward and consistent with the text of the NVRA and Arizona law, and does not require further review by this Court. Furthermore, as a case of first impression, there are no jurisprudential reasons, such as a conflict with a Supreme Court decision or the need to resolve a circuit court split, which favor granting certiorari.

PROCEDURAL HISTORY

Congress passed the NVRA in 1993 in part to create uniform "[n]ational procedures for voter registration for elections for Federal office." 42 U.S.C. § 1973gg-2 (Pet. App. 3h-4h). As discussed below, one of those procedures specifies that the United States

Election Assistance Commission ("EAC") "shall develop a mail voter registration form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). Other provisions state that "[e]ach State shall accept and use" the Federal Form, and "[i]n addition to accepting and using" the Federal Form, "a State may develop and use" its own voter registration form. 42 U.S.C. § 1973gg-4(a)(1-2) (Pet. App. 7h-8h).

In November 2004, Arizona voters passed Proposition 200. Two provisions within Proposition 200 affect voting. One provision requires the County Recorder to "reject any application for registration that is not accompanied by satisfactory proof of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h-50h). A second requires voters who vote on Election Day to provide specified forms of identification at the polls. *Id.*[1] In December 2005,

---

[1] The United States Attorney General precleared the voting changes contained within Proposition 200 in 2005 under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. NVRA compliance is not within the scope of Section 5 review, and as Section 5 provides, the Attorney General's decision not to object to a voting change has no effect on future litigation, such as NVRA litigation, to enjoin the change: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Indeed, the Department of Justice participated in the briefing and oral argument before the Ninth Circuit in *Gonzalez III* on the side of the plaintiffs on the NVRA issue.

Arizona proposed to the EAC that Arizona be allowed to apply the proof of citizenship provision to the Federal Form. On March 6, 2006, the EAC wrote to Arizona's Secretary of State and stated that "the EAC concludes that the policies you proposed would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4(a))." (Op. App. 11-12.) On March 13, 2006, Arizona's Secretary of State wrote the EAC and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote." (Op. App. 18-19.)

Shortly thereafter, two sets of plaintiffs filed lawsuits contending that Proposition 200's proof of citizenship and polling place identification requirements violated various federal constitutional and statutory provisions. Each lawsuit contained the claim that Arizona's new proof of citizenship provision violated the NVRA. The two lawsuits were consolidated; one set of plaintiffs is the ITCA Plaintiffs. (Pet. App. 7c.)

In the post-trial appeal, a majority of the Ninth Circuit panel in *Gonzalez II*, consisting of Judge Ikuta and Justice O'Connor, who sat by designation, found that Arizona's rejection of Federal Form applications that do not include proof of citizenship violated the NVRA because the State was not "accepting and using" the Federal Form. (Pet. App. 1a-47a,

61a-62a.) Judge Kozinski dissented on the NVRA claim but the focus of his dissent was that the panel never should have considered the NVRA claim on the merits because "the law of the circuit" doctrine precluded the panel from doing so. (*Id.* at 79a-80a.) Arizona petitioned for rehearing *en banc* and its petition was granted. (Pet. App. 1b-6b.)

In an opinion by Judge Ikuta, the *en banc* panel in *Gonzalez III* also found for plaintiffs on the NVRA claim, in an 8-2 vote. (Pet. App. 1c-43c.) As discussed below, the court found that by rejecting Federal Forms that do not provide proof of citizenship, Arizona was not "accepting and using" the Federal Form. (*Id.* at 10c-43c.) The majority included Judge Kozinski who explained his change in position as follows:

> The dissent sees some inconsistency between my conclusion today and that in my "well drafted dissent to the original panel opinion." But, as a member of the three-judge panel, I had no occasion to construe the statute de novo because we were bound by law of the circuit and law of the case. . . . As an en banc court, we cannot defer to *Gonzalez I*. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I

> believe the preemptive reading of the statute is somewhat better than the alternative.

(Pet. App. 94c-95c) (Kozinski, C.J., concurring) (citations omitted). Judge Rawlinson, joined by Judge Smith, dissented on the NVRA claim. Judge Rawlinson noted that the NVRA allows a state to "develop and use" a state mail-in form and that the state form, in certain respects, may include additional requirements beyond those prescribed by the EAC for the Federal Form; she reasoned from this that Arizona could thus reject Federal Forms that do not satisfy requirements that Arizona independently establishes. (Pet. App. 100c-122c) (Rawlinson, J., concurring and dissenting).

Arizona promptly moved to stay the mandate and the ITCA Respondents opposed the request. The *en banc* court denied Arizona's motion by a 7-3 vote. (Op. App. 1-10.) The Ninth Circuit held, *inter alia*, that Arizona did not demonstrate a reasonable probability that the Supreme Court would grant certiorari or a significant possibility that the Court would reverse the Ninth Circuit's decision. (Op. App. 7-8.)

Arizona then applied to this Court for a stay of the mandate. Justice Kennedy referred the matter to the entire Court and the Court denied the application for a stay. Justice Alito would have granted the application for a stay. *Arizona v. Abeytia*, 2012 U.S. LEXIS 4878 (U.S. June 28, 2012).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Ninth Circuit Properly Analyzed the Issue of Preemption under the Elections Clause

Arizona's principal attack upon the Ninth Circuit's decision is that the Ninth Circuit allegedly erred by failing to apply preemption principles found in this Court's Supremacy Clause cases. (Pet. App. 15-25.) Specifically, Arizona claims that the Ninth Circuit erred by not applying the "presumption against preemption" and the "plain statement rule." (Pet. App. 15.) Finally, Arizona claims that the Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), demonstrates that Supremacy Clause principles should apply to an Elections Clause case. (Pet. App. 20-22.) Additionally, Arizona asserts that the Ninth Circuit erred by preempting without first finding a "conflict between the NVRA and Proposition 200" as part of its preemption holding. (Pet. App. 17.) Arizona also contends that "[t]he Circuit Courts of Appeals are Split Concerning the Appropriate Preemption Analysis for Challenges to State Laws Under the Elections Clause." (Pet. App. 22-25.) As detailed below, none of these arguments stand scrutiny.

A. The Ninth Circuit Correctly Followed This Court's Consistent Line of Elections Clause Precedent in Applying its Preemption Analysis

The Ninth Circuit correctly distinguished between the preemption analysis required under the Elections Clause and that required under the Supremacy Clause, and its thorough analysis of preemption issues followed a consistent line of Supreme Court precedent, in which this Court applied less deferential review in Elections Clause cases, than it did in Supremacy Clause cases. Indeed, none of the ten judges on the Ninth Circuit *en banc* panel found that Supreme Court precedent requires application of Supremacy Clause preemption principles to Elections Clause cases. Arizona has failed to cite a single Elections Clause case that applied the presumption against preemption, the plain statement rule, or other Supremacy Clause preemption principles. Arizona also fails to show how the decision in *Arizona v. United States* is relevant to the Elections Clause.

The Ninth Circuit correctly distinguished between the preemption analysis required under the Elections Clause and Supremacy Clause preemption. The Elections Clause gives Congress the authority to make or alter any state election regulation relating to the time, place, and manner of federal elections: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in

each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators." U.S. Const. art. I, § 4, cl. 1 (Pet. App. 1h).

This Court has found that the Framers reserved to Congress the authority to make or alter any regulation concerning the time, place, or manner for federal election as a safeguard against potential state abuse. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 808-09 (1995). For this reason, the Court has stated that the power to regulate federal elections is relatively unusual in that the federal government delegates authority to the states, as opposed to the more typical arrangement where the states have reserved authority, or inherent authority, arising from their sovereignty:

> [T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that '[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof.' This duty parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature

> thereof may direct, a Number of Electors.' Art. II, §1, cl. 2. These Clauses are express delegations of power to the States to act with respect to federal elections.
>
> This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.

U.S. Term Limits, 514 U.S. at 804-05.

This Court repeatedly has made clear that a state statute regulating the time, place or manner of federal elections is void if it conflicts with federal law. In *Ex Parte Siebold*, 100 U.S. 371 (1879), the Court explained that the state and federal regulations affecting federal elections should be treated as one harmonious system of rules adopted by the same legislature, but when the federal and state laws conflict, the state law is void to the extent there is a conflict:

> The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules loses sight of the fact that the regulations made by Congress are paramount to those made by the State legislature, and, if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.

> No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.

100 U.S. at 384. The Court stated there would be an "intrinsic difficulty" under this system if federal and state authority were equal "[b]ut no such equality exists" because the "power of Congress . . . is paramount." *Id.* at 392.

The Court's most recent Elections Clause case, *Foster v. Love*, 522 U.S. 67 (1997) involved Louisiana's open primary law for Congressional elections. Louisiana conducted a Congressional primary in October. Under the Louisiana law, if one candidate received a majority of the vote, there would be no general election in November. The issue before the Court was whether this procedure conflicted with federal law providing for a general election in November. *Id.* at 69-70. In deciding the case, the Court quoted *Ex Parte Siebold*'s holding that Congressional regulations relating to federal elections are paramount to state law, and if and when there is a conflict, the state law is void. *Foster*, 522 U.S. at 69. Louisiana argued that there was no conflict between its law and the federal statute because Louisiana provided for a general election on the day prescribed by federal law, and that election would

occur whenever no candidate received a majority of the votes in the primary. According to Louisiana, this meant that its system regulated the "manner" of the election and not the "time" of the election. The Court rejected this argument as "wordplay" and "an imaginative characterization" of the statute, and instead applied a straightforward interpretation of the state statute. *Id.* at 72-73. The Court made clear that the conflict was limited to the facts before it: "This case thus does not present the question whether a State must always employ the conventional mechanics of an election. We hold only today that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 71 n.4.

In this case, the Ninth Circuit specifically adopted the principles enunciated in *Ex Parte Siebold* and *Foster* in deciding upon the analytic framework to be used to determine whether the proof of citizenship provision, as applied to the Federal Form, conflicts with the NVRA:

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold,* we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold,* 100 U.S. at 384. If the state law complements the congressional procedural scheme,

> we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster,* 522 U.S. at 74, 118 S.Ct. 464; *see id.* at 72-73, 118 S.Ct. 464. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

(Pet. App. 19c-20c.)

In contrast to preemption under the Elections Clause, preemption under the Supremacy Clause reflects our constitutional system of "dual sovereignty," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and are therefore more searching when reviewing Congressional action that implicates powers traditionally reserved to the states. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. art. X. This Court has described

the tension between federal authority under the Supremacy Clause and state authority as a "delicate balance," *Gregory*, 501 U.S. at 460. By arguing that this case should be governed by Supremacy Clause rules – including a presumption against preemption, *see Wyeth v. Levine*, 555 U.S. 555, 565 (2009), and a requirement that Congress make its intention to preempt state law "clear and manifest," *Gregory*, 501 U.S. at 461 (internal citation omitted), Arizona overlooks the critical differences between the Elections Clause and the Supremacy Clause.[2]

Those differences were clearly identified by the Ninth Circuit (Pet. App. 11c-17c), which properly found that Supremacy Clause preemption principles do not apply to an Elections Clause case:

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[2] Arizona also presents an incomplete account of this Court's Supremacy Clause jurisprudence. In addition to express preemption, the Court has recognized two other types of preemption under the Supremacy Clause. One is "field preemption," where "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 132 S. Ct. at 2501. The other is "conflict preemption" where "compliance against both federal law and state regulations is a physical impossibility," *id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States*, 132 S. Ct. at 2501 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

> Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a "delicate balance" between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance. For this reason, the "presumption against preemption" and "plain statement rule" that guide Supremacy Clause analysis are not transferable to the Elections Clause context.

(Pet. App. 16c.)[3] The Ninth Circuit further observed that in *Foster*, the Supreme Court did not use the Supremacy Clause analysis used by the Fifth Circuit, and did not mention the "plain statement" rule or the "presumption against preemption" in its decision. (*Id.* at 17c.) The Ninth Circuit also further noted that the Supreme Court never mentioned Supremacy Clause principles or relied on them in any of its decisions involving the Elections Clause. (*Id.*)

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[3] Regulation by States of federal elections could not logically be reserved to States under their police powers, because States could not have exercised said powers before federal elected offices were created by the adoption of the U.S. Constitution. It follows that States could not find inherent powers to control the election of federal offices, and thus, any power over federal elections must necessarily be found in powers expressly delegated to the States by the Constitution or Congress.

Arizona contends that the Supreme Court has "consistently applied" Supremacy Clause principles to Elections Clause cases because the Elections Clause involves regulation of a state police power:

> In all pre-emption cases and particularly in those which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . [the Court] "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Because of the States' constitutional role in the regulation of elections for federal office, this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause.

(Pet. App. 16.)

Arizona's argument fails on many levels. To begin with, as discussed above, a State's authority to regulate federal elections does not fall within its Tenth Amendment reserved power, rather it is a delegated authority under Article I, Section 4. Moreover, none of the Supreme Court decisions Arizona cites in support of its argument stand for the proposition that Supremacy Clause principles, such as the "plain

statement" rule and the "presumption against preemption," apply to the Elections Clause.

In addition to *Ex Parte Siebold* (Pet. App. 17-20) and *Foster v. Love* (Pet. App. passim), Arizona cites a number of cases for the proposition that States generally have broad authority to regulate the time, place, and manner of federal elections and/or that such authority exists provided there is no conflicting federal law. *Cook v. Gralike*, 531 U.S. 510 (2001) (Pet. App. 15); *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93 (2003) (Pet. App. 17); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (Pet. App. 16); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (Pet. App. 15); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (Pet. App. 16, 18); *United States v. Classic*, 313 U.S. 299 (1941) (Pet. App. 16, 22); *Smiley v. Holm*, 285 U.S. 355 (1932) (Pet. App. 17.) However, none of these cases apply an analysis inconsistent with the analysis employed by the Ninth Circuit. In *Cook*, 531 U.S. at 522-26, this Supreme Court affirmed that state authority to regulate federal elections is a delegated authority, not a reserved power under the Tenth Amendment, and found that the state law at issue was not authorized by the Elections Clause. In *McConnell*, 540 U.S. at 186-87, the Court found that the federal statute at issue did not go beyond Congress's Elections Clause authority and that there was no Elections Clause preemption issue. Similarly, *Tashjian* and *Purcell* did not involve Elections Clause

preemption issues. In *Roudebush*, 405 U.S. at 23-26, the Court held that Indiana could conduct a recount of a close Congressional race but that the Senate would have the last word on who would be declared the winner so federal power was paramount. In *Classic*, 313 U.S. at 314-20, the Court held that the Elections Clause, among other provisions, gave Congress the authority to criminalize voter fraud in primary elections. And in *Smiley*, 285 U.S. at 372-74, the Supreme Court stated that the Elections Clause did not speak to the issue of whether a governor could veto reapportionment legislation where there is no federal legislation concerning the issue.

Arizona also attempts, unsuccessfully, to find support for its argument in this Court's recent Supremacy Clause decision in *Arizona v. United States*, noting that this Court applies Supremacy Clause preemption analysis "even in areas in which Congress possesses broad constitutional powers." (Pet. App. 20.) The constitutional power that Congress exercises when it regulates federal elections, however, is not simply "broad." It is the product of a constitutional provision that expressly addresses and specifically defines the respective roles of state and federal government. Under the Elections Clause, the States must create regulations involving the time, place, and manner of federal elections, but any of those regulations can be nullified or modified by Congress. The

overriding authority of the federal government is thus expressly embodied in the constitutional text.

As noted above, Arizona's position found no support from any members of the Ninth Circuit *en banc* panel. The two dissenters explicitly stated that they reached their position "notwithstanding whether a presumption against preemption generally exists under the Elections Clause, as it does under the Supremacy Clause." (Pet. App. 101c.) In his concurring opinion, Judge Kozinski stated that the Supreme Court "has never articulated any doctrine giving deference to the states under the Elections Clause," (Pet. App. 91c) and agreed that the majority was correct in finding that the Supreme Court has not adopted the clear statement rule or the presumption against preemption in any Elections Clause case.[4] (Pet. App. 90c.)

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[4] Judge Kozinski's concurrence suggested that the states' interest in curbing electoral fraud might warrant application of Supremacy Clause principles to Elections Clause cases (Pet. App. 90c-91c). Arizona does not make this argument, and it is unclear how this concern that is topical in nature could provide a basis for rethinking this Court's longstanding view of the allocation of authority specified by the Framers in the Elections Clause. In any event, Congress provided specific and substantial criminal penalties for election fraud in the NVRA, including criminal penalties for false statements about eligibility to vote, which complement an array of other preexisting federal criminal penalties for corruption of the election process. The Ninth Circuit decision does not impair Arizona's right to prosecute election fraud under its own laws, and this case provides no other reason to believe that Arizona's ability to curb electoral

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B. The Ninth Circuit Properly Found that the NVRA and the Requirements of Proposition 200 were in Conflict with One Another

Arizona's argument that the Ninth Circuit did not find a conflict between the NVRA and Proposition 200 is flatly wrong. Contrary to Arizona's claim, the Ninth Circuit expressly found a conflict between the NVRA and Proposition 200. The Ninth Circuit majority's concluding paragraph states, *inter alia*, that "[g]iven the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections." (Pet. App. 59c.) Another portion of the opinion states that "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the conflict between the state and federal procedures." (Pet. App. 34c.)

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fraud will be materially impaired by the Ninth Circuit's decision. Accordingly, this case fails to present a question that warrants a fundamental reconsideration of the Court's Elections Clause jurisprudence.

C. There is No Circuit Split as to Matters of Preemption in Elections Clause Cases

Finally, Arizona contends that there is a circuit split on whether Supremacy Clause preemption analysis applies to Elections Clause cases. (Pet. App. 25.) Arizona relies primarily on three cases: *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001); and *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985). Arizona's contention is unavailing for several reasons. First, even if there was a circuit split, it would be of little or no consequence since (as discussed above) this Court already has made clear that Elections Clause preemption analysis is different from Supremacy Clause preemption analysis. Second, and in any event, there is no circuit split. Arizona observes that *Bomer* and *McIntyre* held that there must be a direct conflict between federal and state law to trigger Elections Clause preemption (Pet. App. 23), but that poses no issue to be decided by this Court since the Ninth Circuit found a direct conflict. *Keisling* is inapposite since it was decided by a Ninth Circuit three-judge panel and, by definition, the Ninth Circuit's *en banc* holdings in this case supersede any conflicting holdings in *Keisling*. Moreover, nowhere in the *McIntyre*, *Bomer*, or *Keisling* opinions did the courts explicitly apply Supremacy Clause principles to an Elections Clause case or apply the plain statement rule or the

presumption against preemption. The only circuit court cases that have addressed the issue of whether Elections Clause preemption differs from Supremacy Clause preemption is this case and *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008), and in both cases, the courts distinguished the two preemption analyses.[5] Thus, there is no circuit conflict.[6]

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[5] Indeed, a federal district court in Texas that recently granted a motion for preliminary injunction on three NVRA claims, *inter alia*, analyzed the question of whether Supremacy Clause principles applied to Elections Clause preemption. *Voting for Am., Inc. v. Andrade*, No. G-12-44, 2012 U.S. Dist. LEXIS 108303 (S.D. Tex. Aug. 2, 2012). It found that *Bomer* did not reach the issue, and that the only circuit courts which had, *Gonzalez* and *Harkless*, had found that Supremacy Clause preemption did not apply to an Elections Clause case. *Id.* at *46-50.

Arizona includes a footnote discussing *United States v. Missouri*, 535 F.3d 844, 850 n.2 (8th Cir. 2008) where Arizona claims that the "Eighth Circuit recognized that the plain statement rule is likely to be appropriate under the Elections Clause." (Pet. App. 25.) However, as Arizona acknowledges (*id.*), the Eighth Circuit did not reach this issue, 535 F.3d at 850 n.2. Moreover, the court never stated that it was "likely" the plain statement rule applies to the Elections Clause.

[6] A more detailed discussion of *McIntyre*, *Bomer* and *Keisling* only serves to further demonstrate why those cases are not in conflict with this case. In *McIntyre*, the issue was similar to that in *Roudebusch*. There was a close election for a United States House of Representatives seat from Indiana between McIntyre and McCloskey. McIntyre filed a state court action that McCloskey removed to federal court. The House recounted the votes and seated McCloskey. 766 F.2d at 1080-81. Relying on *Roudebusch*, the 7th Circuit found that the state court could hold a re-recount but that the House had the final say anyway. *Id.* at 1084-85. As a result, Congressional procedures prevailed

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II. The Ninth Circuit Did Not Err in Finding That Proposition 200 and the NVRA Conflict and There is No Circuit Split Regarding the Ninth Circuit's Interpretation of the NVRA

Arizona contends that the Ninth Circuit erred in holding that the NVRA preempts the proof-of-citizenship requirement in Proposition 200. (Pet. App. 25-33.) Arizona's contention does not provide a proper basis for granting Arizona's petition for a number of reasons.

At the outset, there are no jurisprudential reasons for granting certiorari as to this issue. In particular, this holding does not conflict with any Supreme

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over the state procedures. *Bomer*, 199 F.3d at 774, involved the question discussed in Foster of whether Texas's use of early voting conflicted with the federal law setting Election Day as the first Tuesday after the first Monday in November. *Keisling* raised a similar question regarding Oregon's use of voting by mail over an extended period. 259 F.3d at 1170. In *Bomer*, 199 F.3d at 776, the Fifth Circuit applied *Foster* and found that "the Texas scheme is not inconsistent with the federal election statutes as interpreted by the court in *Foster*." It also found that three federal statutes authorized absentee voting for federal elections so it could hardly be the case that voting in federal elections was limited to one day as the appellants had urged. *Id.* at 776-77. The court in *Keisling* reached a similar conclusion. *Keisling*, 259 F.3d at 1176. Thus, the courts in *Keisling* and *Foster* did not rely on a Supremacy Clause preemption analysis to reach their decision but instead on the Supreme Court's interpretation in *Foster* of the federal Election Day law and on other federal laws allowing absentee voting before Election Day.

Court decision concerning the relationship between the NVRA and state voter registration provisions and, likewise, there is no circuit court split on this issue. *See* Sup. Ct. R. 10. Arizona does not contend otherwise.

Arizona's argument that the Ninth Circuit erred in its interpretation of the NVRA is merely a restatement of its previous mistaken argument that the Ninth Circuit should have applied Supremacy Clause principles. This is evident from the first sentence of this section of Arizona's brief ("If the court of appeals had applied traditional preemption principles, it would have found that Proposition 200's evidence-of-citizenship requirement was valid") (Pet. App. 25) and the last sentence as well ("The court of appeals erred in adopting an interpretation of the NVRA that ignores the plain statement rule and the presumption against preemption.") (Pet. App. 33.)

Moreover, the Ninth Circuit properly construed the express language of the NVRA and Proposition 200 in holding that Arizona is not lawfully accepting and using the Federal Form (by rejecting Federal Forms that do not include proof of citizenship). It also properly examined whether its interpretation is consistent with the purposes of the NVRA. In reaching these determinations, the Ninth Circuit discussed in detail the language of the NVRA, as well as the

language of Proposition 200 and Arizona's procedures for implementing Proposition 200. (Pet. App. 20c-43c.)

A few points are worth highlighting in particular. The first purpose Congress identified in passing the NVRA was "to establish procedures that will increase the number of citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1) (Pet. App. 2h).[7] To effectuate this, the NVRA sets forth three federally-required methods for registering voters for federal elections, including by-mail registration using the Federal Form created by the EAC. 42 U.S.C. § 1973gg-2 (Pet. App. 3h). The NVRA states that the EAC "shall develop a mail voter registration application form for elections for Federal office" in consultation with the States' chief election officers. 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). The statute also provides the following with respect to the Federal Form and any State mail-in form:

> (a) Form
>
> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission

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[7] Congress also expressly found that "discriminatory and unfair registration laws and procedures have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3) (Pet. App. 1h-2h).

> pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.
>
> (2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.
>
> (3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

42 U.S.C. § 1973gg-4(a) (Pet. App. 7h-8h).

Among other things, the Federal Form asks voters the question: "Are you a citizen of the United States of America?" with a check box to answer yes or no. Applicants who check "no" are instructed not to complete the form. In addition, the applicant must attest that he or she is a citizen and that the information is "true to the best of [the applicant's] knowledge under penalty of perjury." The Form does not require any additional proof of citizenship. (Pet. App. 60c-84c.)

Arizona's Voter Registration Form states that "[a] complete voter registration form must also contain *proof of citizenship* or the form will be rejected." (Pet. App. 85c.) (emphasis in original). The Arizona form

describes the ways an applicant can fulfill the proof of citizenship requirement. (Pet. App. 88c.) As enacted by Proposition 200, Arizona law states: "[t]he county recorder shall reject *any* application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h) (emphasis added). The statute goes on to define the documentation required to prove citizenship. *Id.* The Arizona Election Procedures Manual, which has the force and effect of law, Ariz. Rev. Stat. Ann. § 16-452, provides that any applicant whose application is rejected because she or he did not provide proof of citizenship must submit an entirely new registration form in order to attempt to register in the future. Arizona Secretary of State Procedures Manual (Oct. 2007) (Pet. App. 28c.)

After Proposition 200 was enacted, Arizona requested that the EAC modify the Federal Form to require Arizona registration applicants to provide documentary proof of citizenship. After the EAC rejected the State's request, Arizona proceeded nonetheless to apply the documentary proof of citizenship requirement to all Federal Form applications. (Pet. App. 34c, 41c n.29; Op. App. 18-19.)

The Ninth Circuit performed a detailed analysis in reaching its conclusion that Arizona's actions violate the NVRA. (Pet. App. 20c-43c.) The essence of that analysis is relatively straightforward and is based on the express language of the NVRA and

Proposition 200: the NVRA specifies that "[e]ach State shall accept and use" the Federal Form, 42 U.S.C. § 1973gg-4(a)(1) (Pet. App. 7h), which does not require proof of citizenship, whereas Proposition 200 states that a "county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h). The conflict ("accept and use" vs. "reject") could not be clearer. Both provisions are mandatory and place Arizona election officials in the position of inevitably complying with one and violating the other.

Arizona's claim that this straightforward analysis is allegedly erroneous is largely a reiteration of the two Ninth Circuit dissenters' position in *Gonzalez III*, and thus has already been addressed, and persuasively rejected, by the *Gonzalez III* majority. The statutory language argument made by Arizona is that, because the NVRA allows States to "develop and use" their own form, which may include additional requirements not included in the Federal Form, Congress' intent was to allow States to reject Federal Forms that do not comply with those additional requirements. (Pet. App. 30.) This argument clearly misreads the statutory language. As pointed out by the *Gonzalez III* majority, States are required to accept and use the Federal Form, and "*in addition*," may "develop and use" their own form. States can neither develop and use the state form "*instead of*"

accepting and using the Federal Form, nor can States attach additional conditions to the acceptance and use of the Federal Form. Moreover, as the Ninth Circuit found, there is nothing illogical or inconsistent in requiring States to accept the Federal Form even when States may have additional requirements on their own form. (Pet. App. 31c-34c.) (emphasis added).

Furthermore, the NVRA expressly delegates authority to the EAC to determine the contents of the Federal Form (acting in consultation with the States). 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). The EAC declined Arizona's request to provide a requirement of documentary proof of citizenship on the Federal Form (as used in Arizona) and, in so doing, stated that "[t]he Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of further proof." (Op. App. 15.) In response, Arizona's Secretary of State called the EAC's decision "completely inconsistent, unlawful, and without merit" and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. 16-166(F)." (Op. App. 18-19.) As the Ninth Circuit properly found, "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the

conflict between the state and federal procedures." (Pet. App. 34c.)

Arizona also argues that because one purpose of the NVRA is to enhance the integrity of elections, Proposition 200 is consistent with, and does not violate, the NVRA. (Pet. App. 27.) The Ninth Circuit recognized that one purpose of the NVRA is "to protect the integrity of the electoral process," 42 U.S.C. § 1973gg(b)(3) (Pet. App. 2h), and "recognize[d] Arizona's concern about fraudulent voter registration." (Pet. App. 41c.). However, as the Ninth Circuit court also properly pointed out, the "Elections Clause gives Congress the last word on how this concern will be addressed in the context of federal elections," and noted that "Congress was well aware of the problem of voter fraud when it passed the act and provided for numerous protections [against voter fraud]." (*Id.*)[8]

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[8] The *Gonzalez III* majority set forth the numerous anti-voter fraud protections contained in the NVRA:

> These safeguards include the NVRA's requirement that the Federal Form, the State Forms, and the Motor Voter Forms contain an attestation clause that sets out the requirements for voter eligibility. *Id.* §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury, *id.* §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C), and persons who knowingly and willfully engage in fraudulent registration practices are subject to criminal penalties, *id.* § 1973gg-10(2). In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. *See id.* § 1973gg-4(c). Finally, section 1973gg-6 requires states

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The Ninth Circuit further noted that, with respect to the Federal Form, Congress delegated to the EAC – and not the States – the responsibility for establishing procedures that will facilitate voter registration while protecting the integrity of elections, and the EAC decided to require applicants to sign their registration applications under penalty of perjury, but not to require documentary proof of citizenship. (Pet. App. 42c.)

Arizona makes two other related arguments. It contends that: (1) the burden on applicants of a proof of citizenship requirement is not excessive; and (2) the Ninth Circuit's decision "cannot be squared with" this Court's decision in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), which found that the burden imposed on voters by Indiana's photo identification law did not outweigh the benefits of the law. (Pet. App. 29.) The Ninth Circuit correctly rejected these arguments as well. It held that the proof of citizenship requirement undermines Congress's goal of streamlining the registration process for all applicants, and that *Crawford* dealt with a different issue and involved a different constitutional

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to give notice to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations. *See id.* § 1973gg-6(a)(2).

(Pet. App. 41c n.28.)

provision with a different constitutional test. (Pet. App. 37c-38c.)

Another argument Arizona makes is that because Congress, in enacting the NVRA, was interested in registering eligible voters and the NVRA includes provisions enabling state election officials to remove ineligible voters from the registration list, "Proposition 200 does not stand as an obstacle to the accomplishment and execution of Congress's purpose in enacting the NVRA."[9] (Pet. App. 31.) To support its argument, Arizona cites two cases, *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) and *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010) (Pet. App. 31), but Arizona's

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[9] Arizona's use of the phrase "obstacle to the accomplishment and execution of Congress's purpose" is a clear attempt to import conflict preemption standards used under a Supremacy Clause analysis. (Pet. App. 26). The Ninth Circuit did not analyze the conflict between Proposition 200 and the NVRA under this precise phraseology, as Arizona notes (Pet. App. 27-28); however, the Ninth Circuit did not need to do so because Supremacy Clause preemption standards do not apply, as discussed above. Nonetheless, the clear import of the Ninth Circuit's analysis is that Arizona's proof of citizenship requirement is an obstacle to the accomplishment and execution of Congress's purpose. (Pet. App. 30c) ("the federal and state enactments treat the same subject matter" but "are seriously out of tune with each other in several ways"); (Pet. App. 34c) ("Proposition 200's registration provision clashes with the EAC's delegation of authority to the EAC"); (Pet. App. 36c) ("Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process.").

argument fails to account for the fact that the language "shall accept and use" is mandatory language requiring the states to perform a specific act and Arizona's refusal to follow the express language of the NVRA frustrates Congress's purpose. In contrast, the courts in *Bell* and *Buescher* found that the actions by the States did not contravene the express language of the NVRA and so those actions did not frustrate Congress's purpose.

Finally, as it argued before the Ninth Circuit, Arizona claims that *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), supports its position. In *McKay*, 226 F.3d at 255-56, the Sixth Circuit held that Tennessee did not violate the NVRA by refusing to register an individual who did not provide his Social Security number. As the Ninth Circuit found, *McKay* is distinguishable because the Federal Form permits states to ask for a Social Security number and provides specific instructions to Tennessee applicants regarding the need to provide their full Social Security number. (Pet. App. 34c n.26.) Arizona contends that the Ninth Circuit "misses the point" because the court in *McKay* based its decision on the fact that the NVRA does not prohibit the use of Social Security numbers, not on whether the Federal Form permits it. (Pet. App. 29.) Actually, Arizona misses the point. While the text of the NVRA does not expressly prohibit States from asking for proof of citizenship, it delegates to the EAC the authority to decide the contents of the Federal Form with some limitations.

The EAC did not include a proof of citizenship requirement on the Federal Form. If the Federal Form did not include an item allowing certain States to ask for a full Social Security number,[10] then Tennessee likewise would not be able to require applicants using the Federal Form to provide their full Social Security number.[11]

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[10] A provision of the Help America Vote Act of 2002 requires voter registration applicants to provide the last four digits of their Social Security number if they do not have a driver's license. 42 U.S.C. § 15483(a)(5)(A)(i)(II). (Pet. App. 33h.)

[11] Arizona cites *Young v. Fordice*, 520 U.S. 273 (1997) for the proposition that the NVRA leaves room for the states to make policy choices, including what information to require from voter registration applicants. (Pet. App. 28.) *Young* does not support Arizona's position. In *Young*, the central issue was whether voting changes that Mississippi made to implement under the NVRA needed to be precleared under Section 5 of the Voting Rights Act. 520 U.S. at 275. The Court held that aspects of Mississippi's NVRA implementation program required preclearance because they "reflected policy choice and discretion by Mississippi officials." *Id.* at 285. At the same time, the Court "recognize[d] that the NVRA imposes certain mandates on the states, describing those mandates in detail." *Id.* at 286. Though the Court did not specifically address whether the "accept and use" provision was mandatory or discretionary, the language that "[e]ach State shall accept and use" the Federal Form is clearly mandatory – not discretionary – language.

CONCLUSION

For the foregoing reasons, ITCA Respondents respectfully request that the Court deny Arizona's Petition for Writ for Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

No. 08-17094

D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

ORDER

(Filed Jun. 7, 2012)

STATE OF ARIZONA; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County

Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder; KEN BENNETT,

Defendants-Appellees.

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN

No. 08-17115

D.C. No. 2:06-cv-01268-ROS

VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; PATTY HANSEN, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County

Election Director;
BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

Before: KOZINSKI, Chief Judge, PREGERSON, RYMER, GRABER, BERZON, RAWLINSON, CLIFTON, BYBEE, IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.[1]

The State of Arizona moves to stay the mandate for a period of 90 days pending the filing of its petition for certiorari. A party moving to stay the mandate "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).[2]

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[1] Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion.

[2] Ninth Circuit Rule 41-1 provides that a stay "will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1; *see also United States v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008).

In determining whether there is "good cause for a stay" under Rule 41(d)(2)(A), we apply the three-part test laid out in *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (order) (citing Supreme Court cases vacating stays of the mandate pending certiorari where the courts of appeals failed to apply the three-part test required by *Barefoot*). Under this test, the stay applicant must show that there is (1) "a reasonable probability that four Members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot*, 463 U.S. at 895 (internal quotation marks omitted); *see also Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (holding that in order to show "good cause for a stay" under Rule 41(d)(2)(A), the applicant must show "(1) a reasonable probability that the Supreme Court will grant *certiorari*; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay"); *Doe v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005) (same); *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (same). In a close case, this court must balance the equities by assessing the harm to each party if a stay is or is not granted. *See Wilson*, 122 F.3d at 719 (balancing the equities and determining that a stay

would cause irreparable harm to the party opposing the stay); *see also Nara*, 494 F.3d at 1133; *Miller*, 418 F.3d at 951, 953; *Books*, 239 F.3d at 828-29.

We have held that "[o]rdinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay," and that the "matter is entrusted to the circuit court's sound discretion." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). A stay in this case, however, raises unusual factors, because it has the potential to affect the upcoming federal elections in Arizona. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (noting the importance and sensitivity of the election context in this very case). If Arizona files a petition for certiorari in the next 90 days, the stay will continue until the Supreme Court either denies certiorari or grants certiorari and resolves the case. *See* Fed R. App. P. 41(d)(2)(B). These actions will likely occur in close proximity to the November elections. In light of the potential effect of our decision on an upcoming election, we must undertake a more searching inquiry in exercising our discretion to grant or deny a stay.

Applying *Barefoot*, we must first determine whether Arizona has demonstrated a reasonable probability that the Supreme Court will grant certiorari and a significant possibility that the Court will reverse our decision. *Barefoot*, 463 U.S. at 895. We conclude that Arizona has not met this standard. We are particularly mindful that (1) nine out of eleven members of the en banc panel agreed that

Proposition 200's registration provision is preempted by the National Voter Registration Act (NVRA); (2) we are not aware of any conflict between our decision and the decisions of other circuits; and (3) the Supreme Court has not yet addressed the legal questions governing this case. *See Wilson,* 122 F.3d at 719 (considering similar factors); *see also Miller,* 418 F.3d at 952 (finding little probability of further review by the Supreme Court where the issue was one of first impression and there was no inter-circuit conflict).

Second, we consider the equities. On the one hand, Arizona has "demonstrated the clear possibility of irreparable injury to its citizens" if a stay is not granted because "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Wilson,* 122 F.3d at 719 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Moreover, Arizona "'has a compelling interest in preserving the integrity of its election process.'" *Purcell,* 549 U.S. at 4 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)). If we deny the stay and the Supreme Court ultimately grants certiorari and reverses our en banc decision, the effect of our denial will be that Arizona must register applicants who use the Federal Form, but who would otherwise be ineligible to register to vote under Proposition 200 because they do not have the required forms of identification. Arizona stresses its concern that applicants using the Federal Form may in fact be ineligible to vote and argues that the

additional forms of identification required by Proposition 200 will prevent potential voter fraud. We note, however, that Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud. *See* 42 U.S.C. §§ 1973gg3(c)(2)(C), 1973gg-7(b)(2); *Gonzalez v. Arizona*, ___ F.3d ___, No. 09-17094, 2012 WL 1293149, at *12 (9th Cir. Apr. 17, 2012).

On the other hand, "[c]ountering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." *Purcell*, 549 U.S. at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). If the Supreme Court ultimately denies certiorari or grants certiorari and affirms, the effect of the stay will be that Arizona may reject the registration forms of applicants who are eligible to vote, and who would otherwise be able to register using the Federal Form, but do not possess the forms of identification required by Proposition 200. Such applicants may be denied their fundamental political right to vote in the 2012 federal elections if the Supreme Court does not resolve the case by November. Applicants whose Federal Forms are rejected may be discouraged from registering to vote even if they have, or could obtain, the forms of identification required by Proposition 200. Even if the Court denies certiorari in time for the November elections, a decision to stay the mandate could itself "result in voter confusion and consequent incentive to remain away

from the polls." *Id.* at 4-5. Congress's determination that streamlined registration procedures are vital to ensure that voters are not frustrated in their ability to vote, *see Gonzalez*, ___ F.3d ___, 2012 WL 1293149, at *10, weighs heavily in favor of denying a stay. In light of these factors, including the public interest as determined by Congress, we deem the equities to weigh in favor of the appellants.

Accordingly, because Arizona has not demonstrated a reasonable probability that the Supreme Court will grant certiorari or a reasonable possibility that the Supreme Court would reverse, and because the equities do not weigh in favor of granting a stay, we conclude that Arizona has not made an adequate showing of "good cause" under Rule 41(d)(2)(A). We therefore exercise our discretion to deny the stay. As always, Arizona is free to renew its motion for a stay before the Supreme Court. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23.

DENIED.

Chief Judge Kozinski and Judges Rawlinson and N.R. Smith voted to grant the stay.

[SEAL]

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.*, (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use

the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona's Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute § 16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form

would have their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp 330, 351-355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections . . . or to 'alter' the laws initially promulgated by the states. Thus . . . article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller, 129 F.3d at 836.*

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a

Federal election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d F.3d [sic] 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission* pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. § 1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.[1] The NVRA requires the Federal Voter

[1] The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the

(Continued on following page)

Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.[2] These qualifications are presently reflected on

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Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

[2] These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C.§ 15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be

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[3] *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

/s/ [Signature]
Thomas R. Wilkey
Executive Director

[SEAL]

JAN BREWER
SECRETARY OF STATE
STATE OF ARIZONA

March 13, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue, N.W.
Washington, DC 20005

Dear Chairman DeGregorio,

As the Secretary of State and Chief Election Officer for the State of Arizona, I have significant concerns about the March 8, 2008, letter from your executive director asserting that Arizona may not implement its proof of citizenship law with respect to voters who register using a Federal Mail Voter Registration Form (Federal Form). In my mind, such a policy is completely inconsistent, unlawful, and without merit

The executive director's opinion is incorrect and unlawfully prevents the State of Arizona from implementing an important voting security measure with respect to those voters using the Federal Form. Arizona's proof of citizenship requirement was passed by over one million voters in 2004, and was precleared by the U.S. Department of Justice (DOJ) on January 24, 2005. In addition, DOJ separately precleared our Arizona Voter Registration Form on May 6, 2005, which includes the proof of citizenship instructions now required of all citizens registering to

vote in Arizona. The DOJ has civil enforcement power over the National Voter Registration Act, and has expressed no concern about Arizona's proof of citizenship requirement when registering to vote.

As I stated in my March 9, 2006, letter, I believe your letter provides questionable legal support for its conclusion. After consulting with the Arizona Attorney General, I will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).

As I requested of you in December, I urge you to instruct voters using the Federal Form to register in Arizona that they provide sufficient proof of citizenship. To do otherwise would be incredibly irresponsible and may unnecessarily disenfranchise voters using the Federal Form to register.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Arizona Secretary of State

JKB:kt

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 12-71

Supreme Court, U.S.
FILED
AUG 31 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

JESUS M. GONZALEZ; BERNIE ABEYTIA; DEBBIE LOPEZ; GEORGIA MORRISON FLORES; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; FRIENDLY HOUSE; CHICANOS POR LA CAUSA, INC.; ARIZONA HISPANIC COMMUNITY FORUM; COMMON CAUSE; PROJECT VOTE; AND THE INTER-TRIBAL COUNCIL OF ARIZONA; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; AND HOPI TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GONZALEZ RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1993 Congress enacted the National Voter Registration Act to increase the number of eligible citizens registered to vote in federal elections. 42 U.S.C. § 1973gg(b). One provision of the National Voter Registration Act requires states to "accept and use" a mail voter registration form promulgated by the U.S. Election Assistance Commission ("Federal Form"). Over the last 20 years, millions of Americans across the country have registered to vote using this simple postcard form.

Arizona's Proposition 200 requires state election officials to reject Federal Forms automatically, when the Federal Forms do not provide additional documentation required by Proposition 200.

The question presented is:

Whether the Ninth Circuit, sitting en banc, erred in applying the well-established Elections Clause preemption test to conclude that Arizona's refusal to process Federal Forms (unless accompanied by the documents set out in Proposition 200) departs from the mandate that all states "accept and use" the Federal Form and conflicts with the National Voter Registration Act.

PARTIES TO THE PROCEEDING[1]

Gonzalez Respondents, who were Plaintiffs-Appellants in the lead case below, are: Jesus M. Gonzalez; Bernie Abeytia; Debbie Lopez; Georgia Morrison Flores; Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Arizona Hispanic Community Forum; Common Cause; and Project Vote.[1]

ITCA Respondents, who were Plaintiffs-Appellants in a later-filed, consolidated case below, are: The Inter-Tribal Council of Arizona; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and Hopi Tribe.

Petitioners, who were Defendants-Appellees below, are: the State of Arizona; Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constable, in her official capacity as Yavapai County Election Director; Laura Dean-Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official

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[1] The caption and list of Parties to the Proceeding in the Petition for a Writ of Certiorari contains parties that were previously dismissed from the case, lists the parties in incorrect order and shows incorrect names for some county petitioners. For this reason, Gonzalez Respondents have provided a corrected caption and list of parties in this Brief in Opposition.

PARTIES TO THE PROCEEDING – Continued

capacity as Graham County Election Director; Donna Hale, in her official capacity as La Paz County Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Recorder; Linda Eastlick, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; LeNora Fulton, in her official capacity as Apache County Recorder; Juanita Murray, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Suzie" Sainz, in her official capacity as Santa Cruz County Recorder; Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County

PARTIES TO THE PROCEEDING – Continued

Recorder; and Sue Reynolds, in her official capacity as Yuma County Election Director.

Other parties before the Ninth Circuit in their official capacities were Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Laurette Justman, Navajo County Recorder; and Kelly Dastrup, former Navajo County Election Director.

CORPORATE DISCLOSURE STATEMENT

Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; and Project Vote are incorporated as nonpartisan, nonprofit 501c(3) corporations. Common Cause is incorporated as a nonpartisan, nonprofit 501c(4) corporation. Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Common Cause; and Project Vote have no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

This case involves the voter registration provision of the Arizona Taxpayer and Citizen Protection Act ("Proposition 200"), which requires state election officials to reject voter registration applications unless they include certain documents listed in the statute as proof of U.S. citizenship. Voter registrants who submit valid Federal Forms but who do not provide the documentation required by Proposition 200 are rejected for voter registration.

I. Statutory and Regulatory Background.

A. The National Voter Registration Act.

The National Voter Registration Act of 1993 ("NVRA") establishes national standards and procedures to govern voter registration in federal elections. The statute includes findings that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and declares its purpose is to "establish procedures that will increase the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(a), (b). Congress chose to fulfill its purpose by mandating use of a uniform mail registration application and by requiring states to establish procedures by which individuals could register to vote in federal elections when applying for a driver's license (the so-called "motor-voter" rules) or when visiting certain public agencies. *Id.* § 1973gg-2(a).

In the NVRA, Congress specifically set forth the contents of a national voter registration form and required all states to accept and use the Federal Form for registration to vote in federal elections. Congress vested a federal agency, the Federal Election Commission (now the Election Assistance Commission), with the authority to design a simple, universal form in a "postcard" format. *Id.* § 1973gg-7. In doing so, Congress instructed the Election Assistance Commission ("EAC") to follow specific requirements when the agency designs the national form:

> The mail voter registration form developed [by the EAC] under subsection (a)(2) of this section –
>
> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (2) shall include a statement that –
>
> (A) specifies each eligibility requirement (including citizenship);
>
> (B) contains an attestation that the applicant meets each such requirement; and
>
> (C) requires the signature of the applicant, under penalty of perjury;

> (3) may not include any requirement for notarization or other formal authentication; and
>
> (4) shall include, in print that is identical to that used in the attestation portion of the application –
>
> (i) [voter eligibility requirements and the penalties provided by law for submitting false voter registration];

42 U.S.C. § 1973gg-7.

The mail registration provisions of the NVRA, which are at issue in this case, were modeled on postcard registration programs then existing in approximately half of the states, covering well more than half of the nation's population. The provisions created a uniform national voter registration card that would be made widely available and could be used to register a voter anywhere. The NVRA placed particular emphasis on making the card available to organized voter registration programs. 42 U.S.C. § 1973gg-4(b).

The mail registration provisions of the NVRA have a number of safeguards to prevent voter fraud, including an attestation clause on the Federal Form that sets out the requirements for voter eligibility, requiring registrants to sign the Federal Form under penalty of perjury and imposing criminal penalties on persons who knowingly and willfully engage in fraudulent registration practices. In addition, the NVRA allows states to require first-time voters who

register by mail to vote in person at the polling place, where the voter's identity can be confirmed. Finally, the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable. *See* State App. C at 41c–42c.

During debate over the NVRA, some in Congress objected that postcard registration and other provisions facilitating easier registration would open the door to fraud. Congress considered those objections and modeled each of the provisions of the NVRA after registration practices that had been proven to be sound, effective, and well tested in the states. Congress also included additional safeguards, such as a new criminal offense that severely punished voter registration fraud, 42 U.S.C. § 1973gg-10, and requirements that states establish procedures to maintain the accuracy of their voter registration rolls, 42 U.S.C. § 1973gg-6.[2]

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[2] For some Members of Congress those protections were still insufficient to protect against the possibility that a noncitizen might register to vote. Members in both Houses proposed amendments that would expressly allow states to require that an individual provide additional documentation of his or her citizenship before being allowed to register. But those efforts were defeated in the House and in the Senate precisely *because* they made registration too difficult and thus undermined the central purpose of the NVRA. State App. C at 43c (explaining that the Conference Report indicates "Congress rejected an amendment to the NVRA which would have provided that

(Continued on following page)

In the last presidential election alone, 28 million citizens used the Federal Form to register to vote by mail, in person, or as part of a voter registration drive.[3]

In the NVRA, neither the language instructing the EAC on the contents of the Federal Form nor the provision requiring its acceptance by states permit states to require additional information with the Federal Form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the Federal Form. *See* 42 U.S.C. § 1973gg-4(2) ("*In addition to* accepting and using the [federal] form . . . a state may develop and use a mail voter registration form . . . " (emphasis added)).

B. Proposition 200.

Proposition 200 was enacted in 2004 in order to "discourage illegal immigration." Gonzalez App. 13.

'nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration' because it was not 'consistent with the purposes of the NVRA' and 'could effectively eliminate or seriously interfere with the mail registration program of the Act.'") (quoting H.R.Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148)).

[3] U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey ("EAC Report 2008"), *available at* www.eac.gov/research/election_administration_and_voting_survey.aspx.

Proposition 200 states that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship." *Id.*[4]

Proposition 200's registration provision provides that "the county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship" and sets out a limited list of documents that registrants must produce in order to prove their citizenship.[5] Gonzalez App. 19-21. Pursuant to Proposition 200, Arizona counties reject all voter registration forms that are not also accompanied by the state-required documentation,

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[4] In addition to the voter registration provision, Proposition 200 requires social service agencies to verify the immigration status of applicants for public benefits and requires voters to show identification at the polls on Election Day. Gonzalez App. 23, 25-27.

[5] Several documents listed in Proposition 200 as "satisfactory evidence of citizenship" either do not exist or do not prove U.S. citizenship, thus further narrowing the ability of registrants to comply with the registration provision. These include Bureau of Indian Affairs cards, tribal treaty cards, the naturalization certificate number, and an out of state driver's license. *See, e.g.*, Gonzalez ER Tab 3 at 4, 10. Naturalization certificates state on their face that it is a federal offense to photocopy the certificate without lawful authority, forcing some citizens who rely on the document to have to register in person at the county recorder's office. Gonzalez ER Tab 39.

including voter registration forms promulgated by the federal government under the National Voter Registration Act (NVRA) and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[6] *See* Gonzalez ER Tab 3 at 4 ("Without this proof [of citizenship], a person may not register to vote. *Id.* This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship.").

II. Factual and Procedural Background.

A. Factual Background.

The district court found that following enactment of Proposition 200, over 30,000 individuals were rejected for voter registration in Arizona. Gonzalez ER Tab 3 at 13. Reflecting the demographic composition of Arizona, over 80% of the rejected voters were not Latino. Gonzalez ER Tab 3 at 13. Less than one-third of the rejected registrants were subsequently able to register to vote. Gonzalez ER Tab 3 at 14.

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[6] The NVRA's provisions related to the Federal Form are similar to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff *et seq.*, which permits men and women in the military serving overseas to register to vote with a postcard application. Since implementing the law at issue here (Proposition 200), Arizona has treated UOCAVA forms from overseas military the same as NVRA postcards and rejected them when they are not accompanied by the documents required by Proposition 200.

Voter registration in community-based voter drives plummeted 44%.[7]

Individuals whose voter registration forms are commonly rejected for failure to provide proof of citizenship include Arizona residents who have a driver's license issued before October 1, 1996 (such as those over age 32), who do not have a current Arizona driver's license (including students and new state residents), or who, unbeknownst to them, have a driver's license with a state database code of "Foreign" because the license was issued to them before they became naturalized citizens. The Pima County Recorder testified that even her mother, who was born in New Mexico, could not satisfy the documentation requirements to register to vote under Proposition 200. Gonzalez Tr. Ex. 930, Dep. Ann Rodriguez Aug. 2, 2006, at 90:15-91:3.

In order to register, these citizens must include with their registration – which otherwise can be a stand-alone postcard – a copy of their U.S. birth certificate, passport or naturalization papers. Even if a registrant has a document to satisfy the provision, Proposition 200 requires the registrant to locate the document, photocopy it, and enclose the photocopy with the form in a postage-paid envelope for mailing. State App. C at 36c-37c. Alternatively, the registrant must travel to the county recorder's office to present the required document. The Ninth Circuit concluded that "much of the value of the Federal

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[7] Gonzalez ER Tab 8, Trial Ex. 966.

Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." *Id.*

In March 2006, Arizona wrote the EAC, which is authorized by the NVRA to promulgate the Federal Form, to request that the EAC add to its state-specific instructions on the Federal Form a notice that Arizona would reject Federal Forms that did not comply with Proposition 200. The EAC responded, "After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4))." Gonzalez App. 1-2. Following this correspondence, in which the EAC declined to amend the Federal Form instructions, Arizona continued to reject all Federal Forms that did not provide the supplemental information required by Proposition 200.

B. Procedural History.

Because Proposition 200's registration requirement flatly contradicted the NVRA, Gonzalez Respondents challenged this and other parts of Proposition 200 in 2006. The district court denied Gonzalez Respondents a preliminary injunction. The Ninth Circuit's review of that decision was limited to one provision of the NVRA (allowing states to promulgate registration forms for federal elections in addition to accepting the Federal Form), leading it to conclude that the language of the NVRA allowed Arizona to impose its state requirements on top of the Federal

Form. State App. D at 17d. The case returned to the district court on the merits, and the district court granted summary judgment to Petitioners ("Arizona") on the NVRA issue based entirely on the Ninth Circuit's finding of law. *Gonzalez v. Arizona*, No. CV 06-1268 at 2-3 (D. Ariz. Aug. 28, 2007) (order granting summary judgment).

After trial on the remaining issues, a new panel of the Ninth Circuit took up the entire case and found the earlier panel decision regarding the NVRA to be "clear error." This panel, and later the Ninth Circuit en banc, held that Proposition 200's registration requirements are preempted by the NVRA when registrants use the Federal Form. State App. A at 53a-54a; State App. C at 44c. Following the en banc decision, Arizona asked the Ninth Circuit to stay its mandate. The Ninth Circuit properly refused, concluding it is unnecessary for this Court to take the case, and that Arizona failed to demonstrate the necessary irreparable harm. *Gonzalez v. Arizona*, No. 08-17094 at 7, 8 (9th Cir. June 7, 2012) (order denying stay). On June 28, 2012, this Court denied Arizona's application for a stay of the Ninth Circuit's mandate. *Arizona v. Abeytia*, No. 11-1189 (U.S. June 28, 2012) (order denying stay).

Following issuance of the mandate, the district court ordered that Arizona "shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under [Proposition 200]." Gonzalez App. 11.

The Ninth Circuit's en banc decision was not closely divided; eight of the ten judges on the panel found that the NVRA provision requiring states to "accept and use" the Federal Form preempted Proposition 200's additional registration requirements in instances where the applicant submitted the Federal Form to register to vote. In doing so, the Court carefully analyzed the Elections Clause and this Court's related jurisprudence, focusing primarily on cases in which this Court decided issues relating to Elections Clause preemption, *Ex Parte Siebold,* 100 U.S. 371 (1879) and *Foster v. Love,* 522 U.S. 67 (1997). The Ninth Circuit examined the NVRA and Proposition 200 and concluded that the two statutes addressed the same subject of mail voter registration for federal elections and that they were in conflict. State App. C at 19c-20c.

The Ninth Circuit properly approached the preemption question by considering "the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures." State App. C at 29c. However, because under Proposition 200 county recorders reject every Federal Form that does not also satisfy the additional state law requirements, the Ninth Circuit concluded that "under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." State App. C at 31c.

The Ninth Circuit correctly found three areas of conflict between Proposition 200 and the NVRA.

State App. C at 29c-30c. First, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it is not supplemented with additional documentation. State App. C at 31c-32c. Second, Arizona's rejection of the Federal Form due to lack of additional documentation creates a conflict between state and federal registration procedures and is incompatible with the NVRA's delegation of authority to the EAC. State App. C at 34c. Third, the Ninth Circuit found that Proposition 200 conflicted with the NVRA by undermining the NVRA's goal of streamlining the registration process. State App. C at 36c. The Ninth Circuit concluded that "the NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" State App. C at 59c (emphasis added).

Chief Judge Kozinski concurred and joined the majority in concluding the "best construction of the statute" was the preemptive reading of the NVRA. State App. C at 95c. Chief Judge Kozinski did not adopt the novel preemption test urged by Arizona in its Petition but applied the traditional Elections Clause analysis. *Id.* He further explored whether the NVRA's requirement that Arizona "accept and use" the Federal Form should be construed to mean that states cannot impose additional requirements on registrants who submit the Federal Form. He reviewed the text of the NVRA, which he found "readily susceptible to the interpretation of the majority" and noted that requiring registrants to meet two sets of

proof requirements would be "redundant" and "secondary" and would "sacrific[e] national uniformity." State App. C at 89c.

Two dissenting judges wrote that because one section of the NVRA allows states the option, in addition to accepting and using the Federal Form, of creating a state form for voter registration in federal elections, Arizona may apply its state requirements to the Federal Form. The dissent concluded that its interpretation is "loyal to the wording" of the NVRA "because the Federal Form requirements must be met. State form requirements, constrained by § 1973gg-7(b), *are added to* the Federal Form requirements." State App. C at 111c (emphasis added).

REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly applied the Court's well-established analysis in Elections Clause cases to conclude that Arizona may not reject Federal Forms that are sufficient under the NVRA but do not meet additional state documentation requirements. There is no conflict between the Ninth Circuit's decision and the decisions of other courts. In any event, review of that question would be premature because no other courts of appeals have considered whether states may condition acceptance of the Federal Form on the registrant's provision of additional documents. Furthermore, this case is a poor vehicle to address the issue because adopting the analysis urged by Arizona

will not change the outcome of the case. Finally, the district court has already implemented a remedy following issuance of the Ninth Circuit's mandate and further review will create voter confusion in the upcoming General Election process. This case does not warrant review by the Court.

I. The Ninth Circuit Applied Well-Established Rules For Elections Clause Preemption.

The Court's Elections Clause preemption analysis rests on the core concept that Congress has the power to regulate the broad scope of activities involved in federal elections:

> This Court has recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'

Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Ninth Circuit correctly noted that "the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." State App. C at 16c (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)).

The Ninth Circuit properly concluded that "a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out whatever procedures Congress requires." State App. C at 14c-15c (citing *Foster v. Love*, 522 U.S. 67, 69 (1997)). The Ninth Circuit also correctly observed that "[w]hile Congress may not always choose to exercise this power, '[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.'" State App. C at 13c-14c (citing *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)). In its analysis, the Ninth Circuit followed an unbroken line of cases holding that Congressional enactments in the area of federal elections displace state laws. *See, e.g., Foster*, 522 U.S. at 69 (explaining that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices" (citation omitted)).

The Ninth Circuit properly rejected Arizona's attempt to impose a completely new preemption analysis that is inconsistent with the Court's

decisions in Elections Clause cases. As an initial matter, in its petition, Arizona is unable to identify a single Elections Clause case to support its contention that "this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause" including a "presumption against preemption." Petition for Writ of Certiorari at 16-17, *Arizona v. Gonzalez*, No. 12-71 (filed July 16, 2012) [hereinafter "Pet."].[8]

None of the cases on which Arizona relies examined whether a congressional enactment regulating federal elections preempted state law. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 101 (2003) *overruled by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (declining to analyze whether the Bipartisan Campaign Reform Act exceeds Congress's Elections Clause authority because "Title I only regulates private parties' conduct, imposing no requirements upon States or state officials.");

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[8] Arizona's reliance on *United States v. Classic* is unavailing. *Classic* and other cases hold that state election rules must yield to congressional enactments. *See United States v. Classic*, 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'" (internal citations omitted)).

see also Smiley v. Holm, 285 U.S. 355, 372-73 (1932) (concluding that "there is nothing in article 1, s 4" that precludes a state from using its normal legislative process to conduct congressional redistricting.).

The lack of cases supporting Arizona's position is not surprising given that "the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause." State App. C at 91c (Kozinski, J., concurring). Specifically, Arizona can find no decision by the Court that supports its claim that Elections Clause cases start with the assumption that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. at 16 (citing only *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), which is not an Elections Clause case). This is because the regulation of federal elections was never an historic power of the states. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (explaining that "the power to add qualifications [to serve in Congress] is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States" because the states have no reserved powers related to the national government).

Arizona also offers no support for its argument that the Ninth Circuit departed from traditional Elections Clause analysis in concluding that Congress has the power to determine what information is sufficient to establish eligibility to vote in federal elections. Arizona contends that the Ninth Circuit

should have concluded that "Arizona law requiring prospective voters to provide sufficient evidence of citizenship and the NVRA's requirement that States accept and use the Federal Form can be enforced without conflict." Pet. at 13. However, this conclusion would have required the Ninth Circuit to make a dramatic departure from the established interpretation of the Elections Clause and limit Congressional authority to simply designing the Federal Form and nothing more. In essence, Arizona argues that there is no conflict because Congress can only create the Federal Form while Arizona decides what information is required to establish eligibility to vote in federal elections. Because the Ninth Circuit applied the traditional understanding of the scope of Congressional authority under the Elections Clause, it concluded that Congress may decide what information is necessary to register to vote in federal elections and that a law requiring more documentation from Federal Form applicants is preempted.

Where a state law interferes with Congress's regulation of federal elections, it is preempted. *See, e.g., Ex Parte Siebold*, 100 U.S. 371, 384 (1879) (upholding Congressional authority to impose penalties for violating laws governing the election of congressional members and stating that "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (concluding that the Elections Clause does not prohibit state election recounts because recounts do

not interfere with Congress's power to decide its membership); *Foster v. Love*, 522 U.S. 67, 69 (1997) (striking down a 1978 Louisiana law that set an open primary election in October because it conflicted with the federally-mandated election day in November) (citing *U.S. Term Limits*, 514 U.S. at 832-33).

Thus, the Ninth Circuit correctly applied this Court's long-standing precedent in Elections Clause preemption to conclude that the NVRA superseded that portion of Proposition 200's registration provision that interfered and conflicted with the requirement that states "accept and use" the Federal Form.

The Ninth Circuit also correctly rejected Arizona's argument that requiring Arizona to "accept and use" Federal Forms would frustrate enforcement of the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301-15545. When it enacted HAVA in 2002, Congress again considered the contents of the Federal Form. The provisions of HAVA added several new check boxes to the Federal Form (one of which affirms U.S. citizenship). Nothing in HAVA authorizes states to impose their own documentation requirements onto the Federal Form.

HAVA's drafters anticipated that the statute might intersect with other related laws. Arizona simply cannot avoid HAVA's express language providing that HAVA does not "supersede, restrict or limit the application of NVRA." State App. C at 40c (quotations omitted) (citing 42 U.S.C. § 15545(a)). Although

Arizona suggests that HAVA reconsidered or superseded Congress's decision to allow a voter to register with the Federal Form without documentation of citizenship, the Ninth Circuit correctly found that the express language of HAVA provides otherwise.

II. There Is No Division Among The Circuits.

There is no basis for Arizona's claim that the Ninth Circuit's analysis "conflicts with the Elections Clause analysis of other federal circuit courts." Pet. at 13. On the contrary, the Ninth Circuit applied the same traditional Elections Clause preemption test as other circuits.

After passage of the NVRA, Illinois, California, and Michigan challenged the NVRA as unconstitutional because it infringed on state power, "conscripting state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment." *See Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (the NVRA "does not unconstitutionally impinge upon Michigan's sovereignty by affecting state election procedures"). Each time, however, the challenges failed. *ACORN*, 129 F.3d at 836; *see also Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (the alteration of state registration rules by the NVRA is "exactly what is contemplated by Article I section 4."); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) *cert. denied*,

516 U.S. 1093 (1996). In each case, the courts of appeals relied on the Elections Clause to justify the extent and nature of Congressional regulation of various aspects of the election process. *See, e.g., ACORN*, 129 F.3d at 836 (holding passage of NVRA was proper exercise of Congressional power to regulate federal elections).

In later NVRA cases, the courts of appeals have consistently held that Congress has the authority to direct states to register individuals and to determine the process for registration. *See, e.g., Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (NVRA can hold state officials responsible for implementing the state's function under the NVRA and explaining that "the plain-statement rule does not apply to the NVRA."). In *United States v. Missouri*, the Eighth Circuit found that the NVRA's use of the word "shall" required states to carry out the NVRA's mandate to "conduct a general program" of voter registration, explaining "[w]e see no ambiguity in Congress's intent to place this additional requirement on the states in their conduct of federal elections." 535 F.3d 844, 850 (8th Cir. 2008). The Fourth Circuit also recently held that the NVRA overrides inconsistent state practices. *See Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012) (rejecting state's claim that privacy concerns justified withholding records made public by the NVRA, explaining "It is not the province of this court, however, to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by

the legislature, not the courts, and Congress has already answered the question by enacting [the NVRA].").

The Ninth Circuit's decision here is also consistent with decisions of the other courts of appeals that have soundly rejected attempts by states to read the terms of the NVRA out of existence in order to allow states to impose policies inconsistent with the NVRA. For example, in *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008) the Sixth Circuit held that the NVRA preempted Michigan's practice of removing certain new voters from the rolls after they had registered. Michigan argued that it could remove these voters because it did not consider them "registrants" as that term is used in the NVRA. The Sixth Circuit rejected the state's attempt to re-define "registrant" in a way that allowed it to remove voters who are protected by the NVRA, reasoning:

> A federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses. If we were to adopt defendants' view, states could completely ignore the requirements of the NVRA, 42 U.S.C. § 1973gg-6(d). We refuse to import such a reading to this statute.

U.S. Student Ass'n Found. v. Land, 546 F.3d at 382-83.[9]

In *Charles H. Wesley Educ. Found., Inc. v. Cox*, the Eighth Circuit held that the NVRA preempted Georgia's policy of rejecting voter registration forms mailed in bulk, reasoning:

> In essence, [Georgia's] claim is that the NVRA only requires that mailed registration forms be accepted when delivered both in a timely fashion *and* pursuant to additional state requirements. *See* 42 U.S.C. § 1973gg-6(a)(1)(B),(D) . . . This argument is unpersuasive. By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.

Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005). Similarly here, the Ninth Circuit correctly rejected the argument by Arizona that the NVRA's "accept and use" language is unclear. The Ninth Circuit rejected as "strain[ed]" Arizona's

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[9] The Sixth Circuit's earlier decision in *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000), did not employ a different preemption analysis. Pursuant to the NVRA, the Federal Form promulgated by the EAC includes a box in which the registrant writes an "ID Number." In *McKay*, the Sixth Circuit concluded that Tennessee was authorized by the federal Privacy Act to require its registrants to place their social security numbers in the box on the Federal Form and "Congress intended [the Privacy Act] to survive the more general provisions of the NVRA." *Id.* at 756 (6th Cir. 2000).

claim that it accepted and used the Federal Form, albeit only when the registrant also included documentation required by state law. State App. C at 31c-32c. The Ninth Circuit concluded, using an analysis similar to that of the Eighth and Sixth Circuits, that allowing Arizona to interpret "accept and use" the Federal Form to include automatically rejecting the Federal Form is not what Congress intended in enacting the NVRA.[10]

The cases relied upon by Arizona to claim that Proposition 200 does not interfere with the NVRA are easily distinguishable. In two cases, which dealt with the federal law establishing a federal election day in November, the courts of appeals concluded that the state early voting laws at issue were not inconsistent with federal law because the election is not decided, and thus candidates are not elected, until voters go to the polls on Election Day. *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773,

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[10] Similarly, this Court in *Foster v. Love*, 522 U.S. 67, 69 (1997), rejected a claim by Louisiana that even though it elected most candidates for congressional offices in an October primary election, that did not run afoul of the congressional mandate that federal elections be held in November because the state law regulated the "manner" of the election and federal law regulated the "time" of the election. Refusing to accept the state's distorted interpretation of 2 U.S.C. § 7, and characterizing Louisiana's position as "merely wordplay," this Court concluded that "a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act or law in fact to take place on the date chosen by Congress, clearly violates [2 U.S.C.] § 7." *Id.* at 72-73.

774 (5th Cir. 2000) (concluding that "[b]ecause the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day, we conclude that the Texas early voting scheme is not inconsistent with federal election laws.") and *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001) (concluding that "[w]ithout question, Congress has the authority to compel states to hold these elections on the dates it specifies," but there is no conflict "because in Oregon the 'final selection' cannot be made until the federal election day[.]"). An earlier Seventh Circuit case cited by Arizona similarly held that Congress has authority to impose its own rules for counting ballots in federal elections. *See McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985) (concluding "[a]lthough the rules for counting and not counting ballots therefore are presumptively rules of state law under Art. I, sec. 4, cl. 1, Congress may override these rules under its own power. [No federal law], however, so pervades the field that all competing principles of state law must yield.").

None of the cases cited by Arizona upheld state voter registration practices in the face of a claim that they were inconsistent with the NVRA and none of the cases cited by Arizona support its contention that courts must defer to state laws that are inconsistent with federal laws on the same subject.

Ultimately, the Ninth Circuit's Elections Clause preemption analysis is consistent with the other courts of appeals and particularly with their analysis

in NVRA cases. Not only must states comply with the NVRA's registration mandates, but where state practices conflict or are inconsistent with the NVRA state laws must yield. The Ninth Circuit rightly found no ambiguity in the NVRA's direction that "[e]ach State *shall* accept and use the mail voter registration application form prescribed by the Federal Election Commission. . . ." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added).

III. The Question Presented Does Not Warrant This Court's Attention.

A. This Case Presents No Question Of National Importance And The Issue Raised By Arizona Does Not Require This Court's Immediate Attention.

Elections Clause preemption is conventional and well-established and is not an important, unsettled question of federal law. Because of the consistency with which this and other courts have analyzed preemption under the Elections Clause, there is no need for an immediate definitive interpretation of this NVRA provision, nor is there any reason to believe any court considering the challenge would decide the preemption issue differently. The Ninth Circuit's decision is well reasoned and commanded the en banc panel.

There is also nothing about the facts of this case that make it exceptional or important. Despite Arizona's efforts to portray the Ninth Circuit's decision

as unusual, enforcing the requirement that Arizona accept properly-completed Federal Forms is entirely consistent with other court decisions around the nation that require states to carry out the registration mandates of the NVRA.

Arizona argues that this ruling will "disrupt the delicate balance necessary to maintain federalism principles and interfere with the States' ability to protect the integrity of their elections." Pet. at 13. On the contrary, Elections Clause preemption has been in place for decades without triggering the dire consequences predicted by Arizona. The Ninth Circuit ruling has produced no instability because it was entirely conventional. It is Arizona's approach that would produce both uncertainty and further litigation because it would invite states to layer a myriad of requirements on top of the Federal Form, ostensibly to confirm eligibility, even extending to requirements that registrants submit official mail proving they live at their registration address, submit criminal background checks to confirm that they have no felony convictions and submit mental health evaluations to prove they are competent to vote.[11]

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[11] Although the NVRA contemplates that state officials will reject Federal Forms when the applications are incomplete or when the information on the form reveals that the registrant is not eligible to register to vote, the NVRA does not permit states to reject all Federal Forms that fail to meet additional state requirements.

B. Arizona Has Failed To Show That Any Alleged Difference In The Tests For Elections Clause Preemption Has A Significant Practical Effect.

This case is a poor vehicle for reviewing the standard for Elections Clause preemption cases because the question presented is not outcome determinative. Even if Arizona secured the deferential preemption standard it seeks, the result of the case would be the same because the Ninth Circuit concluded that Proposition 200 was conflict preempted.

Arizona's argument in support of granting the Petition ignores the fact that even if the Court were to adopt a test for Elections Clause preemption that is more deferential to states, that test would still require invalidation of state statutes that conflict with federal law. The Court recently affirmed that even in the Supremacy Clause context, imposing state rules on top of federal rules can "conflict with the careful framework Congress adopted." *Arizona v. U.S.*, 132 S. Ct. 2492, 2502-03 (2012) (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) and *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 288 (1986)). The Court further noted that "a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Arizona v. U.S.*, 132 S. Ct. at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

Because the Ninth Circuit concluded that Proposition 200 conflicts with the NVRA, Proposition 200 would be invalidated on conflict preemption grounds even under the Supremacy Clause. *See* State App. C at 59c ("[T]he NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" (emphasis added)). The conflict that invalidates Proposition 200 does not disappear even if the Ninth Circuit were to give greater deference to Arizona under the Elections Clause.

To the extent that Arizona claims the Ninth Circuit made an error of fact, it is wrong. Arizona argues that as a matter of fact it does "accept and use" the Federal Form even when it rejects every Federal Form that does not meet additional state requirements. *See* Pet. at 4 ("Since the inception of the NVRA, Arizona has used and accepted the Federal Form for voter registration."). No previous court in this case has accepted Arizona's contorted definition of "accept and use." On the contrary, Arizona's contention was rejected by the district court as well as the Ninth Circuit panel and en banc court. *See* Gonzalez ER Tab 3 at 3-4 ("Without this proof, a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. . . . If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship."); State App. A at 8a (noting that Proposition

200 provides that the County Recorder "shall reject any application for registration" that is not accompanied by the additional documentation under Proposition 200).[12] Sitting en banc, the Ninth Circuit found that "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." State App. C at 31c.[13] In any event, if Arizona claims that the Ninth Circuit erred in not accepting the fact that

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[12] Notably, Justice Sandra Day O'Connor (sitting by designation on the Gonzalez II panel) commented during oral argument: "[T]he statute says 'each state shall accept and use' the federal form. Period. Then it says 'in addition to' accepting that form the state can go on and do certain other things. Now suppose we think that's pretty clear? Looks pretty clear to me." Oral Argument at 22:47-23:06, *Gonzalez v. Arizona*, 624 F.3d 1162 (No. 08-17094), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004290.

[13] Conditioning acceptance of the Federal Form on submission of additional documents is not at all like state laws that require registrants to write a particular identification number in the Federal Form box for "ID Number." For this reason, the assertion of amici, that Proposition 200 is similar to requirements that registrants supply portions of their social security numbers or drivers license numbers (which are required by HAVA in any event) are factually untrue. The Ninth Circuit found that Proposition 200 requires many registrants to locate personal documents, photocopy them and then pay extra postage to mail the documents to the county recorders and that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." State App. C at 37c. The fact that tens of thousands of Arizona registrants were rejected after the law went into effect demonstrates that many registrants' drivers licenses alone do not satisfy Proposition 200 requirements.

Arizona accepts and uses the Federal Form, this does not render the case worthy of review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is similarly misplaced. As an initial matter, the Ninth Circuit concluded that Proposition 200 thwarted Congress's purpose in enacting the Federal Form provision. *See* State App. C at 31c-32c ("In contrast, Proposition 200's registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose.").[14]

More importantly, Arizona cannot substitute its own judgment for that of Congress with respect to

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[14] Arizona is not aided by claiming that the NVRA "bar[s Arizona] from properly assessing whether an applicant who registers to vote is eligible to vote." Pet. at 28. On the contrary, Congress decided what was necessary to establish eligibility to vote in federal elections and directed the states to "accept and use" Federal Forms and the information they contained for voter registration. *See* 42 U.S.C. § 1973gg-4.

balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters. Congress chose to balance ensuring election integrity with facilitating voter registration by requiring registrants to check a box asserting their U.S. citizenship on the Federal Form and swearing or affirming their U.S. citizenship under penalty of perjury. The Ninth Circuit correctly observed that "the Elections Clause gives Congress the last word on how this concern [regarding the possibility of registration fraud] will be addressed in the context of federal elections." State App. C at 41c. Arizona must follow the NVRA whether or not it would have balanced the goals differently.[15]

C. The Few Instances Of Non-Citizen Voter Registration In Arizona Do Not Provide A Compelling Reason To Grant The Petition.

Arizona claims an urgent need for this Court to reevaluate its Elections Clause preemption test so that states may prevent non-citizen fraud in voter registration but presents little evidence to support its

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[15] Similarly, whether or not Arizona considers the additional requirements of Proposition 200 to be a "burden" or "obstacle" to voting is beside the point. Pet. at 29 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)). The Ninth Circuit invalidated Proposition 200's registration requirement as applied to the Federal Form because it conflicted with the NVRA, not because it placed an unconstitutional burden on the right to vote.

assertion. Contrary to Arizona's claim, the district court did not find that voter fraud was a significant problem. Pet. at 8. On the contrary, following trial the district court found that Arizona had produced only a handful of "instances" in which non-citizens had registered to vote and even fewer in which non-citizens cast a ballot. Gonzalez ER Tab 3 at 34. Importantly, the district court cited evidence that the small number of non-citizens who had registered to vote had done so mistakenly and without understanding that they were not eligible. Gonzalez ER Tab 3 at 15-17.

In all, the district court found that Arizona had provided evidence that ten non-citizens were proven to have registered to vote (four of whom had voted) in 2005 and nine non-citizens – were proven to have registered to vote (five of whom had voted) in 2007. Gonzalez ER Tab 3 at 15-17. The evidence amounts to nine voters having cast ballots out of 2,734,108 registered voters in Arizona during this same period.[18] The Ninth Circuit concluded, when denying the stay of its mandate, that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing

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[18] Arizona Secretary of State, "State of Arizona Registration Report" (June 1, 2008), *available at* www.azsos.gov/election/voterreg/2008-06-01.pdf.

voter fraud." *Gonzalez v. Arizona*, No. 08-17094 at 8 (9th Cir. June 7, 2012) (order denying stay).[17]

The purpose of Proposition 200's registration requirement, as described in the statute, is to combat undocumented immigration. Gonzalez App. 13 ("This state further finds that illegal immigrants have been given a safe haven in this state . . . and that this conduct . . . undermines the security of our borders and demeans the value of citizenship."). However, Arizona can identify no instances in which undocumented immigrants registered or voted in Arizona. Much to the contrary, and as the Arizona Secretary of State's office wrote prior to the passage of Proposition 200, the "strong desire to remain in the United States and fear of deportation outweigh [noncitizen's] desire to deliberately register to vote before obtaining citizenship. Those who are in the county illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation." Gonzalez App. 9.

The scattered instances of non-citizen voter registration fail to establish any pattern of actual

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[17] Of the prospective jurors who claimed not to be citizens (thereby avoiding jury duty) and had their registrations canceled, it is unknown whether any of them were actually noncitizens or if they voted. Gonzalez ER Tab 3 at 15-17. Election officials in Arizona's largest county testified that they believed some U.S. citizens claimed not to be citizens in order to avoid jury duty. Gonzalez Tr. Ex. 936, Dep. Karen Osborne, Jan. 14, 2008, at 91:4-9; Gonzalez Tr. Ex. 935, Dep. Jasper Altaha, Jan. 23, 2008, at 7:20-25, 8:1-14.

voter fraud in Arizona, much less that the use of the Federal Form has any relationship to voter fraud in the state.[18] Preserving the integrity of the electoral process is one of the stated purposes of the NVRA, and by all indications it has succeeded in fulfilling that purpose. State App. C at 41c-42c (citing 42 U.S.C. § 1973gg(b)(3)). The Federal Form has been used to register millions of voters nationwide over two decades without the alleged voter fraud problem its detractors feared ever coming to pass. Arizona has presented no evidence of voter fraud through use of the Federal Form, and twenty years of experience demonstrates that no such threat exists.

The EAC is statutorily required to report on the impact of the NVRA every two years and, in the two decades since enactment of the NVRA, it has not identified any election-related fraud associated with the Federal Form. In addition, there is not a single reported case in any state or federal court – in Arizona or anywhere else – where an election was alleged to be compromised by non-citizens improperly registering and voting under the NVRA. As the Ninth

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[18] In its petition, Arizona tries to buttress its claims of non-citizen voter fraud by describing unrelated instances in which voter registrations were rejected for incompleteness, illegibility and mistakes in the address. *Compare* Pet. at 8 *with* Gonzalez Tr. Ex. 937, Dep. Karen Osborne, Jan. 23, 2008, at 11:9-17. However, Arizona's county recorders testified that missing names, addresses, and signatures on some registration forms rendered them impossible to process and also that such forms are immediately (and properly) rejected.

Circuit observed below, the NVRA contains numerous safeguards against fraud. *Id.* (citing various provisions of 42 U.S.C. § 1973gg); *see also* U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010, A Report to the 112th Congress, June 30, 2011* ("EAC Report 2009-2010"), *available at* http://www.eac.gov/registration-data/ (most recent periodic EAC report describing state-by-state registration and measures to maintain accuracy of voter rolls, and reporting no cases of fraud).

Because Arizona cannot demonstrate that its interest in protecting the integrity of elections is not met when registrants use the Federal Form, it cannot claim that the well-established Elections Clause preemption analysis employed by the Ninth Circuit requires alteration. *See Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) (noting that the NVRA contains safeguards against voter fraud and "it is entirely conjectural that they are inferior to the protections that [state] law offers").

IV. The Court Would Benefit From Consideration Of The Legal Issues Presented By Other Circuits.

Arizona's contention that Elections Clause preemption merits immediate review is without merit. In the absence of a circuit split over whether the NVRA preempts state laws adding documentation

requirements to the Federal Form, that issue is best left to percolate in the lower courts.

Kansas and Georgia have enacted registration laws similar to Proposition 200. *See* Ga. Code Ann. § 21-2-216 (2009) and Kan. Stat. Ann. § 25-2309(l)-(u) (2012). If those or later laws are challenged under the NVRA, these cases would allow the Court to wait and see whether a circuit split will ever develop. In the meantime, review in this Court is premature.

V. Granting The Petition Will Cause Voter Confusion In The Upcoming General Election.

On August 15, 2012, following issuance of the Ninth Circuit's mandate and briefing by the parties, the district court ordered Arizona to accept Federal Forms. *See* Gonzalez App. 11. Granting Arizona's Petition will cast doubt on the district court's remedy and introduce confusion into the election process because the newly-registered Federal Form voters, who will have recently become eligible to vote in the General Election (as well as county election officials) will be unsure whether the grant of the Petition invalidates their registrations or whether they may have to re-register in order to vote.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.*, (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal

Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona's Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form would have

their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp. 330, 351-355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections . . . or to 'alter' the laws initially promulgated by the states. Thus . . . article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller, 129 F.3d at 836.*

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal

election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d F.3d 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration application prescribed by the U.S. Election Assistance Commission* pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. § 1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.[1]

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[1] The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2), The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.[2] These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has

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[2] These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C. §15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such

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[3] *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

/s/ [Illegible]
Thomas R. Wilkey
Executive Director

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July 18, 2001

Mr. Rick Cunnington
561 West Graythorn Place
Oro Valley, AZ 85737

Dear Mr. Cunnington:

Your letter has been referred to me for a response to your question about what is done by county recorders to deter non-citizens from registering to vote. The National Voter Registration Act of 1993 prohibits the states from requiring people who are registered to vote to prove that they are United States Citizens.

This office, in conjunction with the county recorders, re-designed the voter registration form to make it clear that falsely signing the form is a class 5 felony. The new form also asks the potential voters to check a box if they are a US Citizen and informs them that if they check the "No" box, they should not complete the form. These instructions are also in the Spanish language.

If it comes to the attention of the county recorders or this office that someone has fraudulently registered, the matter is referred to the county attorney where the registration occurred. There have been a some

prosecutions for false registration, which have resulted in convictions.

Federal law requires that a non-citizen must be deported for registering to vote. It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.

Thank you for your question and interest in the voter registration process.

Very truly yours,

/s/ Jessica Funkhauser
JESSICA FUNKHAUSER
State Election Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV-06-1268-PHX-ROS **ORDER** (Filed Aug. 15, 2012)

On August 6, 2012, the Court issued its order regarding Defendants' handling of voter registrations using the National Voter Registration Form under the National Voter Registration Act (the "Federal Form"). The Court provided general guidance and directed the parties to attempt to reach an agreement on specific issues. The parties were not able to agree and have now submitted competing proposals. Defendants have also moved for reconsideration of certain aspects of the Court's August 6, 2012 Order. Having considered the parties' proposals, Defendants' motion for reconsideration, and the entire record, the Court enters the following Order.

IT IS ORDERED the Motion for Entry of Preliminary Order (Doc. 1071) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Withdraw (Doc. 1072) is **DENIED** based on the failure to comply with Local Rule 83.3.

IT IS FURTHER ORDERED the Motion for Reconsideration (Doc. 1088) is **DENIED**.

IT IS FURTHER ORDERED AS FOLLOWS:

A. Defendants shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under A.R.S. § 16-166(F).

B. For the reasons explained in this Court's Order of August 6, 2012, the Ninth Circuit's decision is retroactive. (Doc. 1082). But in the interest of maintaining the accuracy of the voter registration database, and in the interest of avoiding the imposition of significant hardships on Defendants, retroactive registration of applicants using the Federal Form is limited to forms submitted on or after August 1, 2011.

C. For each voter registration applicant who applied to register to vote on or after August 1, 2011, and who used a Federal Form that was rejected solely due to A.R.S. § 16-166(F), Defendants shall determine whether the applicant was subsequently registered to vote. If not, Defendants shall create a new record for a successful registration of that individual and promptly notify that new registrant of his or her eligibility to vote for candidates for state and federal office.

D. Defendants shall complete the registration required by Paragraph C above on or before August 21, 2012.

E. As previously stated in this Court's order of August 6, 2012, Defendants shall ensure widespread distribution of the Federal Form through all reasonable channels, including channels the Secretary of State has identified as appropriate

for distribution of the State Form. Thus, no later than August 31, 2012 Defendants shall make the Federal. Form available where they make the State Form available, including websites.

F. Where Defendants provide paper copies of the State Form they must also provide paper copies of the Federal Form, in both Spanish and English, with the applicable instructions. Defendants need not provide the entire instruction booklet as large portions of that booklet do not apply to Arizona.

G. All state and local employees responsible for processing voter registrations must immediately be informed of the change in the law and instructed to comply with the new procedures.

H. Defendants have not presented the specific changes they propose making to the Secretary of State Election Procedures Manual but some of the changes proposed by Plaintiffs go beyond what is necessary to comply with the law. Defendants will be permitted to make the changes they deem appropriate but they must do so on an expedited basis. Therefore, within sixty days of this Order Defendants shall revise the Secretary of State Election Procedures Manual to reflect compliance with federal law.

DATED this 15th day of August, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

AN INITIATIVE MEASURE

AMENDING SECTIONS 16-152, 16-166 AND 16-579, ARIZONA REVISED STATUTES; AMENDING TITLE 46, CHAPTER 1, ARTICLE 3, ARIZONA REVISED STATUTES, BY ADDING SECTION 46-140.01; RELATING TO THE ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT.

Be it enacted by the People of the State of Arizona:

Section 1. Short title

This act may be cited as the "Arizona Taxpayer and Citizen Protection Act".

Sec. 2. Findings and declaration

This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Sec. 3. Section 16-152, Arizona Revised Statutes, is amended to read:

16-152. Registration form

A. The form used for the registration of electors shall contain:

1. The date the registrant signed the form.

2. The given name of the registrant, middle name, if any, and surname.

3. Complete address of actual place of residence, including street name and number, apartment or space number, city or town and zip code, or such description of the location of the residence that it can be readily ascertained or identified.

4. Complete mailing address, if different from residence address, including post office address, city or town, zip code or other designation used by the registrant for receiving mail.

5. Party preference.

6. Telephone number, unless unlisted.

7. State or country of birth.

8. Date of birth.

9. Occupation.

10. Indian census number (optional to registrant).

11. Father's name or mother's maiden name.

12. The last four digits of the registrant's social security number (optional to registrant).

13. A statement as to whether or not the registrant is currently registered in another state, county or precinct, and if so, the name, address, county and state of previous registration.

14. A statement that the registrant is a citizen of the United States.

15. A statement that the registrant will be eighteen years of age on or before the date of the next general election.

16. A statement that the registrant has not been convicted of treason or a felony, or if so, that the registrant's civil rights have been restored.

17. A statement that the registrant is a resident of this state and of the county in which the registrant is registering.

18. A statement that executing a false registration is a class 6 felony.

19. The signature of the registrant.

20. If the registrant is unable to sign the form, a statement that the affidavit was completed according to the registrant's direction.

21. A statement that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes.

22. A statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

23. A STATEMENT THAT THE APPLICANT SHALL SUBMIT EVIDENCE OF UNITED STATES CITIZENSHIP WITH THE APPLICATION AND THAT THE REGISTRAR SHALL REJECT THE APPLICATION IF NO EVIDENCE OF CITIZENSHIP IS ATTACHED.

B. A duplicate voter receipt shall be provided with the form that provides space for the name, street address and city of residence of the applicant, party preference and the date of signing. The voter receipt is evidence of valid registration for the purpose of casting a ballot to be verified as prescribed in section 16-584, subsection B.

C. The state voter registration form shall be printed in a form prescribed by the secretary of state.

D. The county recorder may establish procedures to verify whether a registrant has successfully petitioned the court for an injunction against harassment pursuant to section 12-1809 or an order of protection pursuant to section ~~12-1810 or~~ 13-3602 and, if verified,

to protect the registrant's residence address, telephone number or voting precinct number, if appropriate, from public disclosure.

Sec. 4. Section 16-166, Arizona Revised Statutes, is amended to read:

16-166. Verification of registration

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears on the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by section 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the name of the elector will be removed from the general register and transferred to the inactive voter list.

B. If the elector provides the county recorder with a new registration form, the county

recorder shall change the general register to reflect the changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form to the county recorder of the county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify registrants whose addresses may have changed. If

it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration information. If the registrant fails to return the form postmarked not later than twenty-nine days before the next election, the elector shall be removed from the general register and transferred to the inactive voter list. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. THE COUNTY RECORDER SHALL REJECT ANY APPLICATION FOR REGISTRATION THAT IS NOT ACCOMPANIED BY SATISFACTORY EVIDENCE OF UNITED STATES CITIZENSHIP. SATISFACTORY

EVIDENCE OF CITIZENSHIP SHALL INCLUDE ANY OF THE FOLLOWING:

1. THE NUMBER OF THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE ISSUED AFTER OCTOBER 1, 1996 BY THE DEPARTMENT OF TRANSPORTATION OR THE EQUIVALENT GOVERNMENTAL AGENCY OF ANOTHER STATE WITHIN THE UNITED STATES IF THE AGENCY INDICATES ON THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE THAT THE PERSON HAS PROVIDED SATISFACTORY PROOF OF UNITED STATES CITIZENSHIP.

2. A LEGIBLE PHOTOCOPY OF THE APPLICANT'S BIRTH CERTIFICATE THAT VERIFIES CITIZENSHIP TO THE SATISFACTION OF THE COUNTY RECORDER.

3. A LEGIBLE PHOTOCOPY OF PERTINENT PAGES OF THE APPLICANT'S UNITED STATES PASSPORT IDENTIFYING THE APPLICANT AND THE APPLICANT'S PASSPORT NUMBER OR PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES PASSPORT.

4. A PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES NATURALIZATION DOCUMENTS OR THE NUMBER OF THE CERTIFICATE OF NATURALIZATION. IF ONLY THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS PROVIDED, THE APPLICANT SHALL NOT BE INCLUDED IN THE REGISTRATION ROLLS UNTIL THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS VERIFIED WITH THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE BY THE COUNTY RECORDER.

5. OTHER DOCUMENTS OR METHODS OF PROOF THAT ARE ESTABLISHED PURSUANT TO THE IMMIGRATION REFORM AND CONTROL ACT OF 1986.

6. THE APPLICANT'S BUREAU OF INDIAN AFFAIRS CARD NUMBER, TRIBAL TREATY CARD NUMBER OR TRIBAL ENROLLMENT NUMBER.

G. NOTWITHSTANDING SUBSECTION F OF THIS SECTION, ANY PERSON WHO IS REGISTERED IN THIS STATE ON THE EFFECTIVE DATE OF THIS AMENDMENT TO THIS SECTION IS DEEMED TO HAVE PROVIDED SATISFACTORY EVIDENCE OF CITIZENSHIP AND SHALL NOT BE REQUIRED TO RESUBMIT

EVIDENCE OF CITIZENSHIP UNLESS THE PERSON IS CHANGING VOTER REGISTRATION FROM ONE COUNTY TO ANOTHER.

H. FOR THE PURPOSES OF THIS SECTION, PROOF OF VOTER REGISTRATION FROM ANOTHER STATE OR COUNTY IS NOT SATISFACTORY EVIDENCE OF CITIZENSHIP.

I. A PERSON WHO MODIFIES VOTER REGISTRATION RECORDS WITH A NEW RESIDENCE BALLOT SHALL NOT BE REQUIRED TO SUBMIT EVIDENCE OF CITIZENSHIP. AFTER CITIZENSHIP HAS BEEN DEMONSTRATED TO THE COUNTY RECORDER, THE PERSON IS NOT REQUIRED TO RESUBMIT SATISFACTORY EVIDENCE OF CITIZENSHIP IN THAT COUNTY.

J. AFTER A PERSON HAS SUBMITTED SATISFACTORY EVIDENCE OF CITIZENSHIP, THE COUNTY RECORDER SHALL INDICATE THIS INFORMATION IN THE PERSON'S PERMANENT VOTER FILE. AFTER TWO YEARS THE COUNTY RECORDER MAY DESTROY ALL DOCUMENTS THAT WERE SUBMITTED AS EVIDENCE OF CITIZENSHIP.

Sec. 5. Section 16-579, Arizona Revised Statutes, is amended to read:

16-579. Procedure for obtaining ballot by elector

A. Every qualified elector, before receiving his ballot, shall announce his name and place of residence in a clear, audible tone of voice to the election official in charge of the signature roster or present his name and residence in writing AND SHALL PRESENT ONE FORM OF IDENTIFICATION THAT BEARS THE NAME, ADDRESS AND PHOTOGRAPH OF THE ELECTOR OR TWO DIFFERENT FORMS OF IDENTIFICATION THAT BEAR THE NAME AND ADDRESS OF THE ELECTOR. If the name is found upon the precinct register by the election officer having charge thereof, or the qualified elector presents a certificate from the county recorder showing that he is entitled by law to vote in the precinct, the election official in charge of the signature roster shall repeat the name and the qualified elector shall be allowed within the voting area.

B. Any qualified elector who is listed as having applied for an early ballot but who states that he has not voted and will not vote an early ballot for this election or surrenders the early ballot to the precinct inspector on election day shall be allowed to vote pursuant to the procedure set forth in section 16-584.

C. Each qualified elector's name shall be numbered consecutively by the clerks, with the number upon the stub of the ballot delivered to him, and in the order of applications for ballots. The election judge having charge of the ballots shall also write his initials upon the stub and the number of the qualified elector as it appears upon the precinct register. The judge shall give the qualified elector only one ballot, and his name shall be immediately checked on the precinct register.

D. Each qualified elector shall sign his name in the signature roster prior to receiving his ballot, but an inspector or judge may sign the roster for an elector who is unable to sign because of physical disability, and in that event the name of the elector shall be written with red ink, and no attestation or other proof shall be necessary. The provisions of this subsection relating to signing the signature roster shall not apply to electors casting a ballot using early voting procedures.

E. A person offering to vote at a special district election for which no special district register has been supplied shall sign an affidavit stating his address and that he resides within the district boundaries or proposed district boundaries and swearing that he is a qualified elector and has not already voted at the election being held.

Sec. 6. Title 46, chapter 1, article 3, Arizona Revised Statutes, is amended by adding section 46-140.01, to read:

46-140.01. Verifying applicants for public benefits; violation; classification; citizen suits

A. AN AGENCY OF THIS STATE AND ALL OF ITS POLITICAL SUBDIVISIONS, INCLUDING LOCAL GOVERNMENTS, THAT ARE RESPONSIBLE FOR THE ADMINISTRATION OF STATE AND LOCAL PUBLIC BENEFITS THAT ARE NOT FEDERALLY MANDATED SHALL DO ALL OF THE FOLLOWING:

1. VERIFY THE IDENTITY OF EACH APPLICANT FOR THOSE BENEFITS AND VERIFY THAT THE APPLICANT IS ELIGIBLE FOR BENEFITS AS PRESCRIBED BY THIS SECTION.

2. PROVIDE ANY OTHER EMPLOYEE OF THIS STATE OR ANY OF ITS POLITICAL SUBDIVISIONS WITH INFORMATION TO VERIFY THE IMMIGRATION STATUS OF ANY APPLICANT FOR THOSE BENEFITS AND ASSIST THE EMPLOYEE IN OBTAINING THAT INFORMATION FROM FEDERAL IMMIGRATION AUTHORITIES.

3. REFUSE TO ACCEPT ANY IDENTIFICATION CARD ISSUED BY THE STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE, INCLUDING A

DRIVER LICENSE, TO ESTABLISH IDENTITY OR DETERMINE ELIGIBILITY FOR THOSE BENEFITS UNLESS THE ISSUING AUTHORITY HAS VERIFIED THE IMMIGRATION STATUS OF THE APPLICANT.

4. REQUIRE ALL EMPLOYEES OF THE STATE AND ITS POLITICAL SUBDIVISIONS TO MAKE A WRITTEN REPORT TO FEDERAL IMMIGRATION AUTHORITIES FOR ANY VIOLATION OF FEDERAL IMMIGRATION LAW BY ANY APPLICANT FOR BENEFITS AND THAT IS DISCOVERED BY THE EMPLOYEE.

B. FAILURE TO REPORT DISCOVERED VIOLATIONS OF FEDERAL IMMIGRATION LAW BY AN EMPLOYEE IS A CLASS 2 MISDEMEANOR. IF THAT EMPLOYEE'S SUPERVISOR KNEW OF THE FAILURE TO REPORT AND FAILED TO DIRECT THE EMPLOYEE TO MAKE THE REPORT, THE SUPERVISOR IS GUILTY OF A CLASS 2 MISDEMEANOR.

C. THIS SECTION SHALL BE ENFORCED WITHOUT REGARD TO RACE, RELIGION, GENDER, ETHNICITY OR NATIONAL ORIGIN. ANY PERSON WHO IS A RESIDENT OF THIS STATE SHALL HAVE STANDING IN ANY COURT OF RECORD TO BRING SUIT AGAINST ANY AGENT OR AGENCY OF THIS STATE OR ITS POLITICAL SUBDIVISIONS TO REMEDY

ANY VIOLATION OF ANY PROVISION OF THIS SECTION, INCLUDING AN ACTION FOR MANDAMUS. COURTS SHALL GIVE PREFERENCE TO ACTIONS BROUGHT UNDER THIS SECTION OVER OTHER CIVIL ACTIONS OR PROCEEDING PENDING IN THE COURT.

Sec. 7. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

REPLY BRIEF

RECORD AND BRIEFS

No. 12-71

Supreme Court, U.S.
FILED
SEP 11 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE; AND BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO THE RESPONSE OF INTER-TRIBAL COUNCIL OF ARIZONA, ET AL.

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INTRODUCTION

The Ninth Circuit's newly created preemption analysis conflicts with this Court's Elections Clause authority, which recognizes that substantial deference must be given to the States' interest in regulating federal election procedures. Respondents Inter-Tribal Council of Arizona et al. (ITCA) concede that "the text of the [National Voter Registration Act (NVRA)] *does not expressly prohibit* States from asking for proof of citizenship," but rather argues that the NVRA "delegates to the [U.S. Election Assistance Commission (EAC)] the authority to decide the contents of the Federal Form with some limitations." ITCA Response at 34. (emphasis added). Respondents thereby acknowledge that the Ninth Circuit's interpretation gives the EAC the authority to preempt state law, even though the statute does not prohibit the state action at issue. This demonstrates the fundamental flaw in the Ninth Circuit's interpretation of the NVRA, because Congress did not intend to give the EAC such authority, and this Court has not recognized that a federal agency has the authority to preempt state law in the manner Respondents propose to empower the EAC. In fact, this Court has held that federal agencies are owed no deference on questions of preemption. *See Wyeth v. Levine*, 555 U.S. 555, 576 (2009).

The Court should grant review because the Ninth Circuit's erroneous decision conflicts with the approaches of the Fifth, Sixth, and Seventh Circuits

(and the Ninth Circuit itself), is contrary to this Court's precedent, and blocks the implementation of a voter-enacted Arizona law that simply asks for evidence of citizenship when people register to vote. As this Court has explained, "[a] State indisputably has a compelling interest in preserving the integrity of its election process [because] [c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal quotations and citation omitted). "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.*

The Ninth Circuit decision also casts doubt on the enforceability of other States' laws, and deters other States from enacting similar voter registration laws. *See* Brief of Alabama et. al. as Amici Curiae in Support of Petitioners (States' Amicus) at 7-9.

ARGUMENT

I. The Ninth Circuit's Interpretation of the Elections Clause's Preemption Analysis Conflicts with This Court's Authority Interpreting the Elections Clause.

Respondents mostly ignore the substance of Arizona's argument and the portions of the Court's

Elections Clause cases that support the State's argument. Instead they rely on a formalistic and inaccurate reading of the Elections Clause cases.

Respondents emphasize that the States' authority to "regulate federal elections" is a delegated rather than a reserved power. Response at 10 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995) (plurality opinion)). By its terms, this distinction does nothing to advance Respondents' argument. Rather it is simply an observation about the construction of the Constitution itself. In any event, *Thornton* recognizes that far from a limitation on the States, the Elections Clause as interpreted by this Court "gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved'" and "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" 514 U.S. at 834 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) and *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), respectively). As Justice Kennedy noted in his concurrence, "[t]he Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province." *Id.* at 841.

Nothing in *Thornton* supports the proposition that the Court would lightly presume that an ambiguous statutory phrase preempts a state referendum directly

aimed at securing the "integrity and reliability of the electoral process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). Indeed, the Court's cases stand for precisely the opposite proposition. *See* Petition at 15-22 (explaining the Court's recognition of the States' historical role in administering federal elections and the Court's deference to the States' regulation of federal elections in its Elections Clause cases).

Here, the Ninth Circuit did more than reject appropriate presumptions; it reversed them. First, it construed a "tantalizingly vague" statute (Pet. App. 90c [Kozinski, J., concurring]) in a manner that was directly contrary to the State's unquestioned interests (*id.* at 41c), inconsistent with the language of another provision of the NVRA (*id.* at 107c [Rawlinson, J., dissenting]), and inconsistent with Congress's expressed intent in enacting the NVRA – "[t]o protect the integrity of the electoral process" (*id.* at 2h). The Ninth Circuit then held that the statute had preemptive effect. Given this Court's Elections Clause jurisprudence that recognizes the States' express role in administering federal elections, it is likely that the Court has "never mentioned Supremacy Clause principles or relied on them in any of its decisions" (ITCA Response at 16) because the Court has never addressed a case in which a circuit court so brazenly disregarded settled principles.

Respondents do not cite to any decision in which this Court, or any circuit court, has interpreted an

ambiguous federal statute in a manner that conflicts with a state law that regulates federal elections and held that the federal law preempts the state law. Instead, the cases that Respondents cite indicate that the Court is reluctant to hold that a federal law preempts a state law under the Elections Clause.

In *Smiley v. Holm*, the Court deferred to state constitutional provisions permitting a gubernatorial veto as applied to legislative action on congressional districts even though the Elections Clause gave that authority solely to the States' legislatures. 285 U.S. at 370-72.[1]

Likewise, *Foster v. Love* does not support Respondents' contention that a heightened preemption test applies under the Elections Clause – they concede that whatever conflict was determined in that case "was limited to the facts before it." ITCA Response at 13 (citing *Foster*, 522 U.S. 67, 72 n.4 (1997)). Instead of manipulating the statutes before it to find a conflict, the Court in *Foster* broadly defined the

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[1] Respondents misstate the holding of *Smiley*, claiming that this Court held that "the Elections Clause did not speak to the issue of whether a governor could veto reapportionment legislation where there is no federal legislation concerning the issue." ITCA Response at 19. Rather, the Court held that "there is nothing in article 1, § 4 which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Smiley*, 285 U.S. at 373.

term "election" in a federal statute to avoid conflicts with state laws that allowed absentee voting. 522 U.S. at 72 n.4.

The Ninth Circuit's decision therefore is contrary to the Court's preemption analysis under the Elections Clause and the Supremacy Clause and contrary to the federalism principles that support the Court's preemption analysis.

II. Respondents' Effort to Minimize the Different Approaches to Elections Clause Cases Among the Circuits Only Highlights the Confusion Facing Federal Courts.

Respondents also claim that the inconsistent approaches of other circuits, including the Ninth Circuit itself, do not warrant review. Again these assertions do not withstand scrutiny. First, although Respondents contend that "nowhere" in the existing Fifth, Seventh, and Ninth Circuit cases "did the courts explicitly apply Supremacy Clause principles to an Elections Clause case" (ITCA Response at 22), this argument ignores the reasoning of those circuits.

In *McIntyre v. Fallahay*, the Seventh Circuit specifically acknowledged that no different analysis is required. 766 F.2d 1078, 1085 (7th Cir. 1985) (relying on Supremacy Clause cases in determining preemption in an Elections Clause case).

In *Voting Integrity Project, Inc. v. Bomer*, the Fifth Circuit concluded that under the express terms of the Constitution, as recognized by this Court, States "'are given . . . a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.'" 199 F.3d 773, 775 (2000) (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941)). "Thus, a state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives *has only one limitation*: the state system cannot directly conflict with federal election laws on the subject." *Id.* (emphasis added). The *Bomer* Court, like the Ninth Circuit in a later similar case, interpreted the term "election" to avoid creating a conflict. *Id.* at 776; *accord Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001).

In contrast to *Bomer* and *Kiesling*, the Ninth Circuit here misapprehended the appropriate analysis under the Elections Clause and then compounded its error by construing the NVRA to create a conflict.

Respondents highlight *Harkless v. Brunner* (ITCA Response at 23), but that case only illustrates the inconsistent approaches that have developed in the cases. In *Harkless*, the Sixth Circuit first concluded that as to the NVRA issue in that case, the federal statute was "clear." 545 F.3d 445, 454 (6th Cir. 2008). Consequently, its description of the plain statement rule was dicta. Even if that language is considered, however, it does not aid Respondents here as it directly

contradicts *Bomer*. *Compare Harkless*, 545 F.3d at 454-55 (stating that "[i]n ratifying Article I, Section 4, the states not only gave Congress plenary authority over federal elections but also explicitly ensured that all conflicts with similar state laws would be resolved wholly in favor of the national government") *with Bomer*, 199 F.3d at 775 (explaining State's explicit role under the Constitution and concluding only where there is a "direct[ ] conflict" must state law yield).[2]

The Ninth Circuit's approach, which assumes expansive Elections Clause powers for the Congress and then construes apparently ambiguous statutory language to create a conflict between state and federal law, warrants review. Nothing in the Response suggests otherwise.

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[2] Likewise, Respondents' citation to *Voting for America, Inc. v. Andrade*, No. G-12-44, 2012 WL 3155566 (S.D. Tex. Aug. 2, 2012) (ITCA Response at 23 n.5) only highlights the federal courts' confusion over the appropriate Elections Clause analysis. In *Andrade*, the three-judge panel found the en banc opinion in this case and *Harkless* persuasive, but recognized that "the full extent of the distinction between Elections Clause preemption and Supremacy Clause preemption need not be resolved at this time" because even under *Bomer*, the plaintiffs' particular NVRA challenge would be successful. 2012 WL 3155566, at * 16. The Fifth Circuit stayed the district court's decision in *Andrade* pending appeal on September 6, 2012. *Voting for America, Inc. v. Andrade*, No 12-40914, Order of September 6, 2012, Document 00511977361 (5th Cir. 2012).

To the extent that Respondents contend that the language in 42 U.S.C. § 1973gg-4(A)(1) that requires States "to accept and use" the Federal Form is unambiguous, their contention cannot be squared with the record in this case in which sixteen federal judges reviewed the statute and six of them would have read the statute differently from the en banc majority. *See* Petition at 8-9. Nevertheless, it is the Ninth Circuit that strains to reach its anomalous construction, as the plain text of the NVRA does not contemplate the result reached by the majority in this case.

The Response argues repeatedly that there were only two dissenting votes in the Ninth Circuit opinion, and quotes selectively from Chief Judge Kozinski's concurrence. It conveniently fails to note that Chief Judge Kozinski, in effect, suggested that this Court should review this case, because it "presents a far more suitable case for deciding whether we should defer to state interest," and that only this Court "can adopt such a doctrine." Pet. App. 91c. Chief Judge Kozinski wrote:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also

> requiring registrants to provide documentation confirming what's in the form.[3]

Id. 89c.

Chief Judge Kozinski also explained that although he concluded that this Court "has never articulated any doctrine giving deference to the states under the Elections Clause," this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors," is appropriate for review by this Court. *Id.* 91c.

III. The Ninth Circuit Erroneously Interpreted the NVRA as Authorizing the EAC, Not Congress, to Preempt State Law.

Respondents concede that "[w]hile the text of the NVRA does not expressly prohibit States from asking for proof of citizenship, it delegates to the EAC the authority to decide the contents of the Federal Form." ITCA Response at 34. In making this concession, Respondents recognize that although the Ninth Circuit strained to find a conflict between the language of the NVRA and Proposition 200, its decision in effect gives

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[3] The State also respectively requests that this Court review Chief Judge Kosinski's dissent in *Gonzalez II* (Pet. App. 95a-101a) for an eloquent explanation of why the broader interpretation of the NVRA, which would make federal and state law consistent, is the more reasonable interpretation.

the EAC the authority to preempt state law. This demonstrates the fundamental flaw in the Ninth Circuit's interpretation. Respondents' concession recognizes that the Ninth Circuit's bottom-line conclusion not only holds that the EAC determines the content of the Federal Form but also authorizes the EAC to preempt state-law requirements.[4]

Respondents' concession that the NVRA "does not expressly prohibit states from asking for proof of citizenship" amplifies the conflict between the Ninth Circuit's decision and this Court's precedent. This Court has long held, consistent with ordinary principles of preemption, that a state statute is invalid under the Elections Clause only "so far as the conflict extends." *Ex parte Siebold*, 100 U.S. 371, 384 (1879). Thus in *Foster*, the Court examined the terms of the statute to determine if there was a conflict. 522 U.S. at 71-72. Here, however, as Respondents would have it, the conflict is not between the state and federal

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[4] Respondents' concession is warranted as it is consistent with *Young v. Fordice*. There this Court recognized that "the NVRA does not list . . . all the other information the State may or may not provide or request," and therefore allows the States to make "policy choice[s]." 520 U.S. 273, 286 (1997). Respondents' effort to distinguish *Young* (ITCA Response at 35 n.11) does not address its language, but merely reasserts that the State must accept and use the Federal Form. There is no dispute that the State has accepted and used the Federal Form, provided that the applicant also presents evidence of citizenship, a request that Respondents concede is "not expressly prohibited by the NVRA." *Id.* at 34.

law, but between state law and the EAC's determination not to include Proposition 200's requirements in the Federal Form instructions. But on issues of preemption, no deference is due executive agencies. *Wyeth*, 555 U.S. at 576; *see also* States' Amicus at 10-12.

Moreover, Congress explicitly denied the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits only the development of the Federal Form, and "provid[ing] information to the States with respect to the responsibilities of the States under [the NVRA]."

The NVRA does not give the EAC the authority to determine what "accept and use" means, and the Ninth Circuit refused to even consider its views on the matter. *See* Pet. App. 43c n.29. In other words, the NVRA does not give the EAC preemptive power over existing state statutes. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 370-71 (1986) (rejecting preemptive power of federal agency where Congress did not grant agency such authority).

IV. Respondents Fail to Distinguish Other Decisions Relied upon by the State.

Respondents finally serially deal with the State's other arguments and authorities in an effort

to rehabilitate the Ninth Circuit's judgment. *See* ITCA Response at 32-34. However, none of the arguments raised by the Respondents do anything more than amplify the inconsistency between the Ninth Circuit's decision in this case and the decisions of other federal circuit and district courts around the country.

CONCLUSION

For the forgoing reasons, Petitioners request the Court to grant the Petition for Certiorari.

Respectfully submitted,

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REPLY BRIEF

No. 12-71

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In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE; AND BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO THE RESPONSE OF JESUS GONZALEZ, ET AL.

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INTRODUCTION

The Petition challenges the Ninth Circuit's application of a heightened preemption analysis to conclude that the National Voter Registration Act (NVRA) preempts an Arizona law requiring applicants for voter registration to provide evidence of citizenship with their federal voter registration form ("the Federal Form").

The Court should grant review because the Ninth Circuit's erroneous decision is contrary to this Court's precedent, blocks the implementation of a voter-enacted Arizona law that ensures the eligibility of applicants for voter registration, casts doubt on the enforceability of other States' laws, and deters other States from enacting similar voter registration laws. *See* Petition at 15-22; *see also* Brief of Alabama et al. as Amici Curiae Supporting Petitioners (States' Amicus) at 5-9.

ARGUMENT

I. Respondents Do Not Substantially Address the Inconsistency Between This Court's Elections Clause Precedent and the Unique Approach that the Ninth Circuit Undertook in This Case.

Rather than address the State's arguments, Respondents simply reiterate their belief that the Ninth Circuit followed this Court's case law. *See* Gonzalez Response at 15-19. Respondents do not substantially

address the State's contention that the Ninth Circuit's approach to the Elections Clause is at odds with settled precedent and that precedent is consistent with Supremacy Clause preemption principles. Instead, Respondents simply restate the premise that the Congress may enact federal election procedures. That is not disputed here. The issue here is whether the Ninth Circuit's narrow interpretation of ambiguous language in the NVRA to make it conflict with state law is correct in light of Elections Clause preemption principles. It is not. The State's Reply to the Response of Inter-Tribal Council of Arizona et al. (ITCA) addresses why the Ninth Circuit's decision conflicts with this Court's authority. Reply to ITCA at 2-6.

Likewise, Respondents' reliance on circuit court cases addressing States' Tenth Amendment challenges to the NVRA is unavailing. Gonzalez Response at 20-21. Those cases addressed whether Congress had the authority to pass the NVRA, not how specific provisions of the NVRA operate in the context of federal elections administered by state election officials. And the Seventh and Ninth Circuits recognized the baseline premise that state sovereignty should be respected. *See, e.g., Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995) (rejecting decree language that went beyond NVRA's terms because "the Department of Justice, in proposing such a decree, and the district judge, in entering it, failed to exhibit an adequate sensitivity to the principle of federalism"); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (recognizing that "an informed understanding of the duality of

sovereignty imbedded within the Constitution of the United States" is an important consideration on remand). The Sixth Circuit did not address the scope of preemption beyond rejecting a Tenth Amendment claim. *Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833 (6th Cir. 1997). These cases do not support the sweeping disregard for interpretive principles that the Ninth Circuit engaged in here. Nowhere do Respondents explain why the statute, even if it is ambiguous, should be given a construction that creates a conflict, rather than a reading, supported by the text of the NVRA itself, that recognizes that Proposition 200 is consistent with its terms.

Nor do any of the more recent cases that Respondents cite support the Ninth Circuit's opinion. For example, in *Harkless v. Brunner*, the Sixth Circuit first concluded that as to the NVRA issue in that case, the federal statute was "clear." 545 F.3d 445, 454 (6th Cir. 2008). Consequently, its description of the plain statement rule was dicta. Here, in contrast, the Ninth Circuit's interpretation of the NVRA is not supported by its language. *Project Vote v. Long*, 682 F.3d 331 (4th Cir. 2012), addressing a different NVRA provision, did not address preemption at all, while *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008), addressed a different provision of the NVRA and does not support the Ninth Circuit's decision. Indeed, to the extent that the Eighth Circuit discussed the Elections Clause at all, it noted the unsettled nature of how to address ambiguous provisions of the NVRA under the Elections Clause. 535 F.3d at 850 n.2.

Respondents also rely on *United States Students Association Foundation v. Land*, 546 F.3d 373 (6th Cir. 2008) and *Charles H. Wesley Educational Foundation v. Cox*, 408 F.3d 1349 (11th Cir. 2005). But those cases do not support the Ninth Circuit's decision either.

In *Land*, the Sixth Circuit addressed whether Michigan was obligated to treat a voter as a registrant under a different provision of the NVRA once it had placed that voter on the active voting rolls, but before that person had received a voter registration card. 546 F.3d at 384-85. The court held that "it is likely that once Michigan gives an individual 'active' status in the QVF [Qualified Voter File], the status that would permit the individual to cast a regular ballot on Election Day, the individual becomes a 'registrant' protected by the NVRA." *Id.* at 384. Under *Land*, however, "Michigan is still free to set eligibility standards and to evaluate whether each applicant meets those standards." *Id.* at 385. Indeed, the court denied holding "that filling out an application is the event that triggers NVRA protection." *Id.*

Cox is likewise inapposite. There the statute barred bulk submissions of voter registration forms. 408 F.3d at 1354. The state statute had nothing to do with eligibility.

Respondents also assert that the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545,[1] did nothing to relieve the alleged conflict between Proposition 200 and the NVRA. Gonzalez Response at 19-20. This argument is incorrect. First, contrary to the Ninth Circuit's conclusion (Pet. App. 41c), the HAVA "savings clause" that provides that it does not "supersede, restrict or limit the application of the NVRA," does not preclude Arizona's argument. The savings clause is not an independent basis for construing the NVRA itself. Rather, if the Ninth Circuit incorrectly applied the NVRA, then the HAVA savings clause is irrelevant. Furthermore, reading the HAVA and the NVRA together in the context of this case leads to the opposite conclusion from the Ninth Circuit's: each statute leaves the States with authority to protect the integrity of elections and public confidence in them. The HAVA imposed new requirements on States to "verify the accuracy of the information provided" on voter registration applications, 42 U.S.C. § 15483(a)(5)(B)(i), and indicated that its fraud-prevention measures are only "minimum requirements" permitting "more strict" state requirements consistent with federal law. 42 U.S.C. § 15484.

Furthermore, following the HAVA's passage, which included a new federal requirement that applicants provide identification prior to voting for the first time,

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[1] The HAVA is reproduced in the Petition Appendix at 28h-42h.

the U.S. Election Assistance Commission (EAC) amended the Federal Form to specifically permit such compliance by "submit[ting] a COPY of this identification with their mail in voter registration form." Pet. App. 61c (emphasis in original); *see also* 42 U.S.C. § 15483(b)(3)(A) (providing for persons to mail copies of documents with the Federal Form). Consequently, the HAVA demonstrates that Congress did not intend to prevent States from requiring additional information concerning voter eligibility and that Proposition 200 is no obstacle to Congress's intent in passing either the HAVA or the NVRA.

Similarly, Respondents' observation that Arizona has applied Proposition 200 to forms provided for under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff, Gonzalez Response at 7 n.6, only highlights the inconsistency of the EAC's approach to Proposition 200[1] and that of other federal agencies. The U.S. Department of Defense instructs military and overseas voters who register to vote using the federal post card application form to provide proof of citizenship in compliance with Arizona law. State's Supplemental Excerpts of Record in Case Nos. 08-17084 & 08-17115 at 24 ¶ 6.

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[1] As noted in the State's Reply to the ITCA, there is no deference to an agency on issues of preemption. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009).

II. The Honor System Endorsed by Respondents Provides No Protection for the Integrity of the Voting System.

The State has noted this Court's eloquent statement of the legitimate interests that the States have in protecting the integrity of their voting process. *See* Reply to ITCA at 2. Respondents argue that Arizona should not be permitted to request evidence of citizenship when someone registers to vote, but should instead rely on the person's sworn statement that he or she is a citizen. The fallacy in that is that someone who is willing to vote illegally will be willing to sign a false statement. What Respondents are urging is that there should be nothing more than an honor system to assure that registered voters are citizens. That was not acceptable to the people of Arizona and the NVRA does not provide otherwise.

Respondents claim that the NVRA contains "a number of safeguards to prevent voter fraud," and therefore asking for evidence of citizenship should be unnecessary. Gonzalez Response at 3. It lists three alleged safeguards. The first is signing under oath as discussed above. The second is the requirement that first time voters vote in person at the polling place, where the voter's identity can be confirmed. However, that simply confirms that the person voting is the same person who registered. It does not ensure that the person is a citizen. Third, "the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable." Gonzalez Response at 4.

That simply would confirm that the address that the applicant gave was correct, and would say nothing at all about whether or not the voter was a citizen.

III. Proposition 200 Does Not Impose an Undue Burden on People Registering to Vote.

As noted in the Petition, the district court found after trial on the non-NVRA claims that Proposition 200 does not impose an undue burden. Petition at 8. Respondents argue that it is an undue burden to have to "locate the document, photo copy it, and enclose the photo copy." Gonzalez Response at 8. But this minor, ministerial task, is imposed on very few people. Over 90% can write down the driver's license number, and all naturalized citizens can write down the naturalization number. *See* Arizona Stay Application Appendix (Stay App.) at 92, 94-95, 113-15. Only a very few need to add a document.

In *Crawford v. Marion County Elections Board*, the Court explained that certain burdens may arise where a photo identification is required in order to vote, such as the loss of identification, but "[b]urdens of that sort, arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question" about the Indiana law requiring voters to provide photo identification. 553 U.S. 181, 197 (2008). Even if the burden may be "somewhat heavier . . . on a limited number of persons," this is not sufficient to sustain a "broad attack" on a state statute. *Id.* at 199-200.

IV. Respondents Misrepresent the Impact of Proposition 200.

Respondents misrepresent the record below.

First, Respondents ignore that the preemption of Proposition 200 as to then Federal Form is a legal, rather than factual question. Furthermore, Respondents selective citations to portions of the record before the district court does not distinguish between the record on summary judgment for their NVRA claim and their other claims, which proceeded to trial. The latter claims alleged constitutional and statutory violations, including violations of the Voting Rights Act. The district court ruled against Respondents on all of their claims and the Ninth Circuit reversed the district court's grant of summary judgment solely on the basis of Proposition 200's application to the Federal Form.

Respondents assert that "following enactment of Proposition 200, over 30,000 individuals were rejected for voter registration in Arizona" and that "[r]eflecting the demographic composition of Arizona, over 80% of the rejected voters were Latino." Gonzalez Response at 7 (citing the district court's findings after trial on non-NVRA counts). But the initial number does not distinguish between state and federal forms, the Federal Form being the subject of the Petition. The district court also found that some 30% of those initially rejected subsequently re-registered and that among those who did not, only 20% were Latino. *See* Stay App. at 97 (on file with the Court in No. 11A1189,

Arizona v. Abeytia). Furthermore, the court concluded that the difference in the electorate based on Proposition 200 was .1%. *Id.* And a drop off in registrations following the implementation of Proposition 200 was "not unexpected because the period before Proposition 200 included the 2004 Presidential election, which was accompanied by a drastic increase in the number of voter registrations." *Id.*

Similarly, Respondents assert that "[v]oter registration in community-based voter drives plummeted by 44%." Gonzalez Response at 8. This finds no support in the district court's order and is not supported by the record citation Respondents provide. Further, the district court found that "none of the [voter registration organization] Plaintiffs testified that Proposition 200 is a severe burden on their [asserted] First Amendment rights." Stay App. at 122. Likewise, contrary to Respondents' characterizations (Gonzalez Response at 8), the district court concluded that if a person has a driver's license that indicates he or she is not a United States citizen, providing additional information "is hardly a severe burden" especially in light of revisions to state and county procedures that permit such applicants, if they have become naturalized, to mail in a copy of their naturalization certificate. Stay App. at 114.

Respondents assert that some 20,000 people did not re-register. Gonzalez Response at 7. The district court, however, found that there was no proof that "the persons rejected are in fact eligible to vote." Stay

App. at 115. Respondents failed to "present[] any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it." *Id.* at 115. "Indeed, [Respondents] only produced one person . . . who [was] unable to register to vote due to Proposition 200's proof of citizenship requirement." *Id.* Post-mandate proceedings revealed that at most 758 Federal Forms lacked "evidence of citizenship" between 2008 and now. *Gonzalez v. Arizona*, CV No. 06-1268 (D. Ariz.) Dckt. # 1087.

Respondents then misrepresent the state of the record concerning voter fraud. Gonzalez Response at 33. Respondents falsely claim that the "district court did not find that voter fraud was a significant problem." *Id.* The district court in fact found that based on the evidence produced at trial "voter fraud is a legitimate and real concern" as was the State's interest in protecting voter confidence. Stay App. at 117-18.

This was well supported in the record. For example, in 2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner they were not U.S. citizens. Stay App. at 99. Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now (ACORN) submitted "garbage" voter-registration forms and had misled noncitizens into

registering to vote. *See id.* at 99; *see also* Appellees' Supplemental Excerpt of Record in No. 08-17094 filed in the Ninth Circuit Court of Appeals at 209-10.

Indeed, the district court found that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the right of lawful voters are not debased by unlawfully cast ballots." Stay App. at 118. Moreover, the district court found that the State has "liberally construe[d] questions raised regarding the right of an elector to vote in favor of allowing the elector to vote" and that there was "no evidence of a purposeful misapplication of Proposition 200's requirements" or any intent to discriminate in its application. *Id.* at 115, 119.

Respondents also point to an EAC report from 2011 that is not in the record. Gonzalez Response at 36. The absence of discussion of voter fraud in the report is likely based on the fact that the report does not purport to be about finding fraud cases. U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010, A Report to the 112th Congress*, June 30, 2011, *available at* http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf. The same report found that Arizona, along with New Mexico, topped the nation in the number of active registrants since 2006, the period that Proposition 200 was in effect. *Id.* at 1. Even when Respondents reach outside the

record, what they uncover confirms that they have misrepresented the impact of Proposition 200.

V. The Court Should Not Wait for Other Statutes to Be Challenged.

Respondents urge the Court to wait to see if similar statutes passed in other States are challenged before granting review. Response at 37. Indeed, four States spanning three federal circuits have enacted legislation "materially identical to Proposition 200." States' Amicus at 8. And some twelve other States have recently contemplated following suit. *Id.* at 8-9. Waiting to resolve this matter until other challenges arise will itself "'result in voter confusion and [a] consequent incentive to remain away from the polls.'" *Id.* at 10 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)).

The people of Arizona enacted Proposition 200 and other States have recognized the States' interest in ensuring that eligible persons are registered. The Ninth Circuit's opinion thus casts a shadow over the decisions of numerous sovereigns who take their obligation to secure the vote seriously. The opinion will undermine voter confidence and calls out for this Court's review.

CONCLUSION

For the forgoing reasons, Petitioners request the Court to grant the Petition for Certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICI CURIAE

The amici curiae are States that have the constitutionally recognized authority to regulate the registration and qualification of voters. *See, e.g.*, U.S. CONST. art. I, § 2 and § 4. That power is inherent in the nature of sovereignty, and it pre-existed the establishment of the federal government. But States' exercise of that power will be diminished in law and in practice if the Ninth Circuit's misapplication of the National Voter Registration Act is not reversed. The effect of the Ninth Circuit's decision is to give the United States Election Assistance Commission unbridled legal authority over registration for federal elections and *de facto* authority over the registration of voters for state and local elections. The decision also casts doubt on the validity of laws in other States. The amici States thus have an interest in seeing the petition granted and the Ninth Circuit's decision reversed.[1]

STATEMENT

Congress enacted the National Voter Registration Act in 1993 ("NVRA"). It prescribes at least three methods for registering voters for federal elections. 42 U.S.C. § 1973gg–2(a). These methods are: (1) "by application made simultaneously with an application for a motor vehicle driver's license," *id.* § 1973gg–

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[1] The amici States gave timely notice of their intent to file this brief to counsel for the parties on July 26, 2012. *See* Sup.Ct. R. 37(2)(a). The amici States do not need consent of the parties to file this brief. *See* Sup.Ct. R. 37(4).

2(a)(1); (2) "by mail application," *id.* §§ 1973gg–2(a)(2), 1973gg–4; and (3) "by application in person," *id.* § 1973gg–2(a)(3). States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law." *Id.* § 1973gg–2(a).

Of particular import to this case, Congress established the Election Assistance Commission ("EAC") to develop and promulgate a federal form for use in registering voters by mail.[2] *See* 42 U.S.C. § 15321 *et seq.* (establishing EAC). The NVRA directs the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2). The form must "enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg–7(b)(1). One of the express eligibility criteria that must be included on the form is a question about United States citizenship. *Id.* § 1973gg-7(b)(2).

When a State passes a voting law that changes its processing requirements, it can ask the EAC to include that requirement in the state-specific instructions that the EAC provides with the federal form. *See id.* § 1973gg–7(a). These changes are usually uncontroversial. For example, as of August 7, 2012, Maine had a request pending to change the registration deadline on the form to comply with a change in Maine law. *See* Letter from Julie L. Flynn,

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[2] The responsibilities of the EAC were formerly held by the Federal Election Commission. The Help America Vote Act of 2002 (HAVA), Pub.L. No. 107–252, 116 Stat. 1666, created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532.

Deputy Secretary of State, to Election Assistance Commission (August 1, 2012). So, although the EAC's federal form is nominally a short list of questions on a post-card-sized piece of paper, it is actually a multi-page list of state-specific requirements in small font. *See* National Mail Voter Registration Form, State Instructions.[3]

These state-specific instructions almost always require that the registrant provide specific identifying information on the federal form. For example, to register in California, "you must provide your California driver's license or California identification card number." *Id.* In Hawaii, "[y]our full social security number is required." *Id.* And "Michigan law requires that the same address be used for voter registration and driver license purposes." *Id.* Registrants must also review their States' specific voter registration qualifications and

". . . swear/affirm that:

- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required."

Id. at Voter Registration Application ¶9.

After Arizonans voted to approve Proposition 200 in a popular referendum, the Attorney General of Arizona requested preclearance of the law from the Department of Justice ("DOJ") under Section Five of the Voting Rights Act. And the Secretary of State of Arizona requested that the EAC modify Arizona's

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[3] *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited August 14, 2012).

state-specific instructions to require registrants to provide proof of citizenship with the federal form. The DOJ precleared the law, *see* Pet. at 6, but the EAC rejected Arizona's request to include the law in the state-specific instructions, *see* Letter from Thomas Wilkins to Arizona Secretary of State (March 6, 2006).[4]

After the trial court below concluded that the NVRA did *not* preempt Proposition 200 and denied a temporary restraining order, the EAC held a new vote on Arizona's request to add Proposition 200 to its state-specific instructions. *See* Certification, *In the Matter of Arizona Request for Accommodation*, Before the Election Assistance Commission (July 31, 2006).[5] That vote was a 2-2 tie, and resulted in another denial. *Id.* The Chairman and Vice Chairman both published explanations for voting, respectively, to approve of and reject the request. Chairman Paul DeGregorio concluded that "leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a ballot." Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote, at 2.[6] He

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[4] *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf (last visited August 14, 2012).

[5] *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF (last visited August 14, 2012).

also opined that "[f]urther clarification of the federal government's role in developing the National Registration Form is needed to prevent future confusion." *Id.* Vice Chairman Ray Martinez concluded that "reversing [the EAC's] current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III July 10, 2006, at 3.[7]

ARGUMENT

The Ninth Circuit's disposition of this case has a certain irony to it. One of Congress's goals in adopting the NVRA was to provide clear guidelines "for Federal, State, and local governments to implement [voter registration] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b)(2). But the lower courts' disposition of this case—first finding Proposition 200 not preempted, then finding it to be preempted years later—has caused nothing but confusion among federal and

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[6] *available at* http://www.eac.gov/assets/1/Page/Chairman%20Paul%20DeGregorio%20Regarding%20Arizona%20and%20the%20Federal%20Voter%20Registration%20Form%20August%208%202006.pdf(last visited August 14, 2012).

[7] *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf (last visited August 14, 2012).

State election officials, not to mention voters. And the *en banc* decision's bottom line—that Arizona cannot enforce a law enacted by popular referendum—nullifies the effect of Arizonans' votes in the name of making it easier for them to register to vote.

The amici States request that the Court grant Arizona's petition for a writ of certiorari for two overarching reasons. First, there is a compelling need for this Court to resolve the NVRA's application to state-specific registration requirements in general, and proof-of-citizenship requirements in particular. Second, the lower court's decision will have bad on-the-ground consequences for the future of Arizona's election system and for the relationship between the States and the EAC.

A. The Ninth Circuit's decision casts doubt on the enforceability of other States' laws.

As Judge Kozinski has noted, the Ninth Circuit's "reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona." *Gonzalez v. Arizona*, 624 F.3d 1162, 1207 (9th Cir. 2010) ("*Gonzalez II*") (Kozinski, J., dissenting). This is so for two reasons.

1. First, the Ninth Circuit's bottom-line conclusion contradicts the EAC's longstanding practice. The EAC has long provided state-specific instructions along with the federal form. But now the Ninth Circuit has declared that the NVRA "on its face . . . does not give states room to add their own requirements to the Federal Form." *Gonzalez v.*

Arizona, 677 F.3d 383, 401 (9th Cir. 2012) (en banc) ("*Gonzalez III*").

Like Arizona, other States require registrants to provide supplemental registration information on the federal form. "In Alabama, '[y]our social security number is requested.' Connecticut requires a 'Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.' Hawaii tells applicants that '[y]our full social security number is required. . . .'" *Gonzalez II*, 624 F.3d at 1207 (Kozinski, J., dissenting) (quoting Federal Form).

The EAC has chosen to include these state-specific requirements on the federal form, notwithstanding the purported uniformity required by the NVRA. The Ninth Circuit's decision calls the EAC's longstanding practice into question, and may compel the EAC to alter how it incorporates state-specific instructions on the federal form in the future.

2. Second, the Ninth Circuit's decision casts doubt on the enforceability of other States' laws that require proof of voter eligibility and that the EAC has *not* incorporated into the federal form's instructions. When voting on Arizona's request, Vice Chairman Ray Martinez noted that legislators in Colorado were actively "considering [similar] legislation," and he predicted that "[o]ther states are likely to follow." Position Statement of Commisioner Ray Martinez III, at 3. Vice Chairman Martinez was right. In the years since the Ninth Circuit initially *upheld* Arizona's citizenship requirement as *not* preempted by the NVRA, *see Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) ("*Gonzalez I*"),

state legislatures across the country have considered and enacted similar measures.

Four States in three different federal circuits—Georgia, Alabama, Kansas, and Tennessee—have already enacted laws that are materially identical to Proposition 200. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(l) (2011); Tenn. Code Ann. § 2-2-141(a) (2011).[8] These laws all require proof of citizenship as part of the registration process. And they all provide, like Proposition 200, that the proof-of-citizenship requirement can be satisfied by providing a driver's license number or a photocopy of one of several enumerated documents. *See* Ga. Stat. Ann. § 21-2-216(g)(2); Ala. Code § 31-13-28(k); Kan. Stat. Ann. § 25-2309(l)(1)-(13); Tenn. Code Ann. § 2-2-141(b). Georgia's law was the first enacted and has been precleared under Section Five of the Voting Rights Act by the DOJ. *See* Ga. Stat. Ann. § 21-2-216(g)(1); Bill Rankin, *DOJ Approves Proof of Citizenship Requirement for Voter Registration*, Atlanta J.-Const. (Apr. 4, 2011).[9]

Even more state legislatures are actively considering laws like Arizona's. In their 2011 legislative sessions, "at least twelve states

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[8] Georgia's, Alabama's, and Kansas's statutes are almost verbatim replicas of Arizona's law. Tennessee's law is phrased in terms of *removing* the registrant from the voting list instead of *denying* the application.

[9] *available at* http://www.ajc.com/news/georgia-politics-elections/doj-approves-proof-of-898132.html. (last visited August 14, 2012).

introduced legislation that would require documentary proof of citizenship to register or vote." WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012, at 17 (2011).[10] This kind of legislation was introduced in States as diverse as Colorado, Connecticut, Oregon, Texas, Maine, and Massachusetts. *Id.*

In addition to the States that have enacted or are considering laws materially identical to Proposition 200, other States have similar laws that require applicants to provide proof of their eligibility. For example, as of August 7, 2012, Louisiana has lodged a request with the EAC to change its state-specific instructions to require applicants without a driver's license number to submit with their application either a copy of a photo ID or a document that proves the applicant's name and address. *See* Letter from Tom Schedler, Secretary of State, to Election Assistance Commission (July 16, 2012). *See also* La. Rev. Stat. Ann. 18:104(A)(16). Similarly, both Florida and Wisconsin require registrants to affirm that they are not felons, *see* Fla. Stat. § 97.041(2)(b); Wis. Stat. Ann. § 6.33(1), but the EAC has previously rejected Florida's request to include its felon-voting certification on the federal form. *See* Position Statement of Commissioner Ray Martinez III July 10, 2006, at 4.

The Court should not wait to grant cert until these other state laws are challenged. As this Court explained in its previous order in this case, "[c]ourt

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[10] *available at* http://usgovinfo.about.com/library/nosearch/voting_rights_laws_report.pdf. (last visited August 14, 2012).

orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Laws like Proposition 200 serve the States' "indisputably" compelling interest "in preserving the integrity of its election process." *Id.* at 4. And the trend among the States is decidedly toward adopting more of them. The Ninth Circuit's decision may chill these legislative developments and call into doubt the laws that are already on the books. The question presented in Arizona's petition deserves resolution by this Court.

B. The Ninth Circuit's decision will have significant on-the-ground consequences.

The Ninth Circuit's decision is likely to lead to two kinds of harmful consequences if it stands. It expands the power of a federal agency, which can now preempt validly-enacted state laws, and it unjustifiably increases the federal government's involvement in state and local elections.

1. First, the Ninth Circuit's decision expands the EAC's power by giving it the ability to nullify state-law voting requirements for the purposes of federal elections. The NVRA requires the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2), and in such a way as to "enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg–7(b)(1). But the primary check on the EAC's authority is that the NVRA *also* gives the States authority to come up with their own

NVRA-compliant forms if they disapprove the federal form. *See* 42 U.S.C. § 1973gg-4(a)(2). "[T]he NVRA itself expressly, not merely implicitly, authorizes a state to 'develop and use' its own form 'for the registration of voters in elections for Federal office,' in addition to accepting and using the [Federal Form].'" *Gonzalez III*, 677 F.3d at 445 (Rawlinson, J., dissenting). "[T]he plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg–7(b)." *Id.*

The Ninth Circuit's decision removes that check, and significantly changes the balance of power between the States and the EAC. Under the Ninth Circuit's decision, if a State enacts a voter-registration provision that a majority of the EAC dislikes, the EAC can preempt, with a simple vote, that state law insofar as it applies to federal elections. This is true even if the State's requirement is consistent with the express provisions of Section 1973gg–7(b) and "necessary to enable the . . . State election official to assess . . . eligibility." 42 U.S.C. § 1973gg–7(b)(1). If that is the rule, then there is no structural reason for the EAC to cooperate with the States going forward even if it may be statutorily obligated to do so. After the Ninth Circuit's decision, the EAC will incorporate state requirements only insofar as a majority of its members like them. That *ad hoc* political calculation is no check at all.

Worse, the EAC's newly-recognized preemptive power is unconstrained by any legal standard. When explaining his vote in favor of adding Proposition 200 to the federal form's "instructions," EAC Chairman DeGregorio requested "[f]urther clarification of the

federal government's role in developing the National Registration Form . . . to prevent future confusion." Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote of July 6, 2006, at 2. But the Ninth Circuit's decision is likely not what he had in mind. There is nothing in that opinion to guide the EAC in exercising its newly-recognized power to preempt state law.

It is unlikely that Congress intended to give the EAC the power of discretionary preemption. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely vested in "a single agency official." *Alaska Dept. of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Instead, this Court has "rightly reject[ed]" the notion that a state law is preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. 2492, 2524 (2012) (Alito, J., concurring in part and dissenting in part). *See also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (no judicial deference to administrative agencies on questions of preemption). The Ninth Circuit's opinion threatens to expand the power of the EAC beyond its proper scope.

2. Second, the Ninth Circuit's decision exacerbates federal interference in state and local elections. The Elections Clause does not give the federal government the power to regulate state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970). But, in practice, the Ninth Circuit's decision does just that. Although the right remedy to the Ninth Circuit's decision is still being litigated,

one of two things will happen in Arizona if the Ninth Circuit's decision stands. Neither is a good option.

One possibility is that Arizona will attempt to enforce Proposition 200 as to state elections, but not enforce it as to federal elections. Because Arizona cannot apply its eligibility requirements to federal elections, Arizona would need to create separate federal-state registration regimes to enforce both state and federal law. "[A]n Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials." *Gonzalez III*, 677 F.3d at 449 (Rawlinson, J., dissenting). This system of "dual registration" would require Arizona to "track whether . . . residents are registered to vote for federal elections, state elections, or both" and to distinguish between these classes of voters on Election Day. *Id.*

Arizona's attempt at dual registration would likely conflict with other federal laws. The story of Mississippi is instructive. Mississippi had separate registration for municipal and state elections until 1987. In that year, a federal court found that the dual registration system was confusing and burdensome, and violated Section Two of the Voting Rights Act. *See Operation Push v. Allain*, 674 F.Supp. 1245, 1269 (N.D. Miss. 1987), *aff'd sub nom.*, *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, after Congress enacted the NVRA, Mississippi tried to use a dual system of registration for state and federal elections—in other words, the same kind of system Arizona would need to adopt. But the DOJ refused to preclear the change under Section Five of the Voting Rights Act. *See Shelby*

County, Ala. v. Holder, 811 F.Supp.2d 424, 481 (D.D.C. 2011) (recounting this history). Like Mississippi, Arizona is covered by Section Five, and it will have to get DOJ's permission to change to dual registration, even though Proposition 200 has already been precleared. *See Young v. Fordice*, 520 U.S. 273 (1997) (requiring preclearance before change from single registration system to dual registration).

The other possibility is for Arizona to disregard the popularly-enacted state law and use the federal form for registering voters for both state and local elections. That is also the most likely result. Arizona's election officials will be under intense economic pressure to adopt, in practice, the EAC's standards, despite the fact that Arizona's voters directly enacted Proposition 200. "[M]aintaining two sets of registration rolls would impose massive administrative and economic burdens" on the State. *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001). For that reason, "most states [have] elected to adopt . . . a single, unified registration system and electorate." *Id.* If Arizona's officials fail to enforce Proposition 200, then the Ninth Circuit's decision will have controlled not only the way Arizona registers voters for federal elections, but the way Arizona registers voters for state and local elections as well.

The Court should review this case. Arizona is a sovereign State, its people directly enacted Proposition 200, and Proposition 200 has been in force throughout the pendency of this litigation. Arizona should not have to deal with the fallout from the Ninth Circuit's decision while it waits for this

Court to grant review of a case from another Circuit. For their part, other States have been, and are, "closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III July 10, 2006, at 3. Arizona and other States need certainty in administering their election laws. The amici respectfully request that the Court grant Arizona's petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-71

In the
Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*
PETITIONERS

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioners

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QUESTIONS PRESENTED

Did the court of appeals err:

1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and

2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. United States* ("*Arizona*"), No. 11-182, ___ U.S. ___ (June 25, 2012); *Chamber of Commerce v. Whiting*, No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011), and *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief). AULDF filed amicus briefs in the Ninth Circuit panel and en banc proceedings in this case.

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) ("*Purcell*") (Stevens, J., concurring), and the effect those factual findings should have on the lower court's analysis.

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[1] Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and all counsel of record consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

It is important at the outset to identify clearly what the Ninth Circuit held below:

Even in the wake of widespread evidence of voter registration fraud, a federal agency can require a state to "accept and use" a voter registration application whose sole protection against non-citizen registration is a signature on a postcard.[2]

In recent years, "voting rights lawsuits have become part of the landscape,"[3] many involving "voter I.D." or requirements that prospective voters identify themselves.[4] This is a "voter I.D." case, but looks at a different stage of the voting process from the cases that have attracted substantial media headlines. This appeal deals only with a "voter registration fraud" law. The other cases often

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[2] "Once the [U.S. Elections Assistance Commission] determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants and to 'accept and use' it for the registration of voters." *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"), Petition Appendix ("Pet. App.") at 1c, 36c.

[3] Robert Barnes, "In Ohio and elsewhere, battles over state voting laws head to court," *The Washington Post*, Aug. 6, 2012, A1, available at: http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4.

[4] "The controversy over voting rights is playing out against the backdrop of a growing national debate over the issue." Sari Horowitz, "Eric Holder vows to aggressively challenge voter ID laws," *The Washington Post*, July 10, 2012, A1, available at: http://www.washingtonpost.com/world/national-security/eric-holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW_story.html.

involved challenges to "voter impersonation fraud" laws that require voters to show identification at the polls;[5] such laws were upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), and in this case. *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"); Pet. App. 6c ("We uphold Proposition 200's requirement that voters show identification at the polling place").

In contrast, this appeal involves voter registration fraud. The Ninth Circuit prohibited the use of any voter identification to prevent voter registration fraud beyond a simple signature on a federal form. *Id.*, 677 F.3d at 400; Pet. App. 33c.

The distinction is critical because, as this Court recognized the last time this case came before it, the court must resolve, *inter alia*, "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell*, 549 U.S. at 6 (Stevens, J., concurring).

The contention in the voter impersonation cases was that such fraud "simply does not exist."[6] Brief of the Indiana Democratic Party in *Crawford*,

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[5] "Thirty states presently have laws in place that will require all voters to show ID at the polls this November. That number could rise; a total of thirty-three states have passed voter ID laws." "Voter Identification Requirements," National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx, (last checked Aug. 3, 2012).

[6] This contention is incorrect, as *amicus* AULDF demonstrated in its brief in *Crawford*. *See, e.g.*, Brief of American Unity Legal Defense Fund as *Amicus Curiae* in *Crawford*, No. 07-21, 07-25, at 9-15 (documenting in detail several examples of in-person voter impersonation).

No. 07-21, 07-25, at 44. This Court rejected the "simply does not exist" theory, saying

> It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Crawford, 553 U.S. at 195-96 (footnotes omitted).

Thus, "the prevalence and character of the fraudulent practices" can be shown by examples of past fraud and by recent "occasional" examples. Under *Crawford*'s footnote 12, even a single incident would be sufficient. *Crawford*, 553 U.S. at 195 n. 12, *citing* Le & Nicolosi, "Dead Voted in Governor's Race," *Seattle Post–Intelligencer*, Jan. 7, 2005, p. A1.

Other circuits have followed this standard. The Eleventh Circuit used this standard to review a photo identification case. *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). "Nor do the more recent decisions in *Burdick* [*v. Takushi*, 504 U.S. 428 (1992)], . . . and *Crawford*, [citations omitted] place an evidentiary burden on the state when defending a voting regulation. . . . The Supreme Court did not require Indiana to prove specific instances of voter fraud, and we decline to impose that burden on Georgia." 554 F.3d at 1353. The Tenth Circuit earlier used the same standard. *ACLU*

of New Mexico v. Santillanes, 546 F.3d 1313, 1323 (10th Cir. 2008)("Just as the Supreme Court did not require Indiana to present specific instances of past conduct to justify its photo identification requirements, we do not require Albuquerque to make such a showing.").

In contrast, there is no similar assertion that voter registration fraud "simply does not exist." *Crawford*, for example, noted that the Brennan Center for Justice, a fraud denier, admitted that "much of the [in-person] fraud was actually absentee ballot fraud or voter registration fraud." *Crawford*, 553 U.S. at 195 n. 12.

Nor is there any real question about the existence of voter registration fraud involving non-citizens in particular. Another prominent fraud denier, Prof. Richard Hasen, wrote recently: "Unlike impersonation fraud, noncitizen voting cannot be dismissed as a Republican fantasy." Richard Hasen, "A Détente Before the Election," *The New York Times*, August 5, 2012, *available at*: http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion (last visited Aug. 6, 2012). In *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007), the Eleventh Circuit upheld the conviction of a Jamaican citizen who voted in the 2000 Presidential election. In *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992), the Court of Appeals of Texas, El Paso, reported that "Simmons lost one vote because one person voted for him who was not a citizen of the United States."

Arizona has a similar record: "between 1996 and [2006], as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens." *Gonzalez v. Arizona*,

485 F.3d 1041, 1048 (9th Cir. 2007) ("*Gonzalez I*"). Even before Arizona became a State, newspapers reported non-citizen voter fraud: "In 1868, the *Arizona Miner* had reported 'hundreds of non-citizens of Mexican origin at Tucson, Tubac, and other places' voting for the same United States congressional candidate 'as many as three times in one day'". Paula Mitchell Marks, AND DIE IN THE WEST, 1996, P. 108.

The New York Times estimated in 2008 that thousands of non-citizens tried to register to vote in Arizona in the prior five years. Ian Urbina, "Voter ID Battle Shifts to Proof of Citizenship," *The New York Times*, May 12, 2008, www.nytimes.com/2008/05/12/us/politics/12vote.html.

And a congressional committee reported:

> The [Maricopa] county recorder [Helen Purcell] has received inquiries from people seeking to become U.S. citizens who have been told by Immigration and Customs Enforcement to obtain a letter from her office confirming they have neither registered to vote nor voted. To date, a review of these matters has turned up 37 non-citizens who have registered to vote. Fifteen of these individuals have voted.

Committee on the Judiciary, "The Deceptive Practices and Voter Intimidation Prevention Act of 2007," H. R. Rep. 110-101 (2007), at 12.

This evidence of non-citizen voter participation does not necessarily mean that there is criminal intent. In June 2006, for example, Francine Busby lost the special election to replace convicted Cong. Randy "Duke" Cunningham (R-CA) in part because she was seen to have encouraged voting by illegal immigrants. "At the end of the event, a man asked Busby a question in Spanish, which was translated

for her: 'I want to help, but I don't have papers.' Busby responded: 'Everybody can help, yeah, absolutely, you can all help. You don't need papers for voting, you don't need to be a registered voter to help.'" John Gizzi, "GOP Moderate Scrapes by After Democrat Panders to Illegals," *Human Events*, June 12, 2006, *available at:* www.humanevents.com/article.php?print+yes&id=15479. Busby argued that she misspoke, but observers noted "those remarks really hurt Busby." *Id.*

It is not just Busby's encouragement which is remarkable. What is equally important, in the context of this case, is that an illegal immigrant wanted "to help." As the fear of immigration enforcement diminishes after federal agencies have announced that only criminal aliens and terrorists will be removed,[7] *Arizona*, __ U.S. at __ , 132 S.Ct. at 2521 (Scalia, J., dissenting), immigrants are increasingly likely to be encouraged to participate, legally or not, in the American political system.[8]

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[7] This lack of interior immigration enforcement and the agency memoranda setting forth that policy is discussed in detail in *Amicus* AULDF's brief in *Arizona*. No. 11-182, Pp. 6-11.

[8] Nor is such encouragement from the highest federal officials unique to this Administration. On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake "Voter Identification Cards" to lists which included non-citizens. Julie Foster, "Non-citizens vote with 'Clinton card'?" WorldNet Daily, November 7, 2000, *available at* www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=18000. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton's signature, which read: "Here is your personal Voter Identification Card. Sign your name, then detach

A more contentious example of non-citizen voter registration fraud was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities."[8] *Id.*, at 16.

An advocacy group was alleged to have encouraged illegal voter registration and voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the voter registrations by the advocacy group, Hermandad Mexicano Nacional, were illegal. *Id.*, at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id.*, at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, "Contested Contest," *Online Focus*, October 22, 1997, *available at* www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html ("And Lopez of Hermandad Mexicana admits his group registered non-citizens."). There was no prosecution.

These are not isolated frauds, but are similar to allegations of fraudulent voter registration

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your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly." *Id.* A copy of the Clinton letter can be found at: http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg.

[8] The Committee nevertheless determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez's margin of victory, so the election challenge was dismissed. *Id.*

incidents nationwide. Some of these allegations are staggering in their magnitude, particularly those involving the now-defunct advocacy group, the Association of Community Organizations for Reform Now ("ACORN").[10] Of 1.3 million voters ACORN claimed to have registered, only 450,000 were actually legitimate new voter registrations. Michael Falcone, "Group's Tally of New Voters Was Vastly Overstated," *The New York Times*, Oct. 24, 2008, A1, *available at* www.nytimes.com/2008/10/24/us/politics/24acorn.html. ACORN officials admitted that up to 30 percent of the registrations they submitted were "faulty." *Id.*

ACORN worked in Arizona and was an original plaintiff in this case. First Amended Complaint, ¶ 17. ACORN off-shoots are still conducting voter registration drives. *See, e.g.*, Tony Lee, "Watchdog Group Calls on IRS to Investigate Re-Branded TX

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[10] *See, e.g.*, Eric Shawn, "ACORN Pleads Guilty to Voter Registration Fraud in Nevada," FoxNews.com, April 6, 2011, http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/, (last visited Aug. 2, 2012); "Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN." Keith Ervin, "Three Plead Guilty in Fake Voter Scheme," *Seattle Times*, October 30, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003982533_acorn30m.html?syndication=rss. "Federal indictments allege the four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," KMBC-TV, "ACORN Workers Indicted on Alleged Voter Fraud," Kansas City, Missouri, Nov. 1, 2006, *available at:* http://www.kmbc.com/politics/10214492/detail.html.

ACORN Branch," Breitbart.com, July 20, 2012, http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch, (last visited Aug. 2, 2012).

Indeed, at least one expert, Kansas Secretary of State Kris Kobach, attributes the recent surge in state voter identification laws to widespread concern about ACORN and similar efforts. Ryan J. Reilly, "Kris Kobach credits ACORN Hysteria With GOP-led Voter ID Renaissance," TPM, July 26, 2012, http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris_kobach_credits_acorn_coverage_for_voter_id_push_video.php (last visited on Aug. 2, 2012).

The context of this case is that voter registration fraud is a known, widespread danger. Whether or not voter impersonation fraud exists, it has not been reported to be as prevalent as voter registration fraud. Courts, following *Crawford*, routinely uphold the use of identification to prevent the less-likely voter impersonation fraud, as did the Ninth Circuit below. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 31c. But, despite the higher likelihood of voter registration fraud, the decision below prevents Arizona from asking for anything more from voter registration applicants using the "Federal Form" than a signature on a postcard. *Gonzalez IV*, 677 F.3d at 398, 400; Pet. App. 32c-33c.

This Court, in a Voting Rights Act pre-clearance decision, seemed to view the statute differently:

> Nonetheless, implementation of the NVRA[11] is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may – or may not – provide or request.

Young v. Fordice, 520 U.S. 273, 286 (1997).

Thus, at a time when advocacy organizations admit that they have submitted hundreds of thousands of "faulty" voter registration applications, the Ninth Circuit suggests that the only protection against fraud a State is permitted to use on a federal form that must be accepted is whether the applicants "attested to being U.S. citizens." *Gonzalez IV*, 677 F.3d at 398-99 (emphasis added); Pet. App. 31c. This willful blindness toward fraud cannot be consistent with the "language and structure" of the NVRA, whose four express purposes include "increas[ing] the number of eligible citizens who register to vote," "enhanc[ing] the participation of eligible citizens as voters," "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4).

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[11] National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg *et seq*.

ADDITIONAL REASONS TO GRANT THE WRIT

The Petition described several conflicts with other decisions, including over preemption under the Supremacy and Elections Clauses, and under the NVRA. There are, however, two other important conflicts with other decisions.

First, the Ninth Circuit misunderstood the "language and structure" of the NVRA, rewrote the text of the statute, ignored three of the four statutory purposes of the NVRA, and its opinion conflicts with, *inter alia*, *Fordice*.

Second, the Ninth Circuit minimized the state interests set forth by this Court in *Purcell*, the last time this case came before it, and considered in *Crawford* and by the 11th and 10th Circuits.

In this hyper-politicized environment, the lower courts are struggling to determine challenges to voter identification laws.[12] The Court should grant the Petition to assist the lower courts in understanding how to analyze voter registration fraud laws.

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[12] *See, e.g.*, *Voting Integrity Project v. Andrade*, No. 3:12-cv-00044, (S.D.Texas, August 2, 2012), Opinion And Order Granting In Part And Denying In Part Plaintiffs' Motion For A Preliminary Injunction, Pp. 37-41. "Although it is clear that the Elections Clause grants Congress the power to override state election laws regulating federal elections, case law says little about the proper standard to apply when analyzing Elections Clause preemption." *Id.*, at 38. The lower court there adopted the Ninth Circuit's analysis. *Id.*, at 40.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ON THE "LANGUAGE AND STRUCTURE" OF THE NVRA.

The initial question is whether the Ninth Circuit correctly assessed the "language and structure" of the NVRA. *Gonzalez IV*, 677 F.3d at 403 n. 29; Pet. App. 41c. Whether or not, as the Ninth Circuit asserts, there is a difference between Supremacy Clause and Election Clause preemption analyses, the difference is likely not in the controlling nature of Congressional intent. "[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

The Ninth Circuit, in its analysis, deflected this question to an agency's interpretation and "balance" of legislative purposes:

> With respect to the Federal Form, Congress delegated to the EAC the decision of how to balance the need "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process," *id.* § 1973gg(b)(1), (3). The EAC struck this balance by requiring applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship.

Gonzalez IV, 677 F.3d at 403; Pet. App. 42c.

Leaving such a decision to a federal agency means that a decision not to enforce the statute operates the same as an affirmative act by Congress

to displace the State law, but this would seem to conflict with decisions such as *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008)("agency nonenforcement of a federal statute is not the same as a policy of approval.").[13]

The Court should not ratify an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Leaving aside these questions, however, the Ninth Circuit's analysis indicates substantial conflicts

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[13] Such an interpretation also raises questions about implied repeals. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-64 (2007)("repeals by implication are not favored" and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." (internal quotation omitted)). If the Elections Clause treats the NVRA as a later enactment by the same "legislature" that passed Arizona's Proposition 200, *Gonzalez IV*, 677 F.3d at 395, Pet. App. 20c, then any repeal that is not express would necessarily be implied. And it likely could not be said that the Arizona provision is a "positive repugnancy" to the federal act, *Home Builders*, 551 U.S. at 664 n. 8, perhaps justifying implied repeal, since it seems to support the statutory purposes of the NVRA. 42 U.S.C. § 1973gg-b(1)-(4).

with statutory interpretation principles as described in other decisions.

A. The Ninth Circuit's Analysis Would Rewrite the Text of the NVRA.

The relevant statutory provision says that a State "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1).

The Ninth Circuit would rewrite that provision to read: "may require only ... the signature of the applicant." This would, in effect, delete the remainder of the sentence so as not to suggest that information other than the signature might be requested.

That revision would be inconsistent with *Fordice*. The Court "recognize[d] that the NVRA imposes certain mandates on States, describing those mandates in detail." 520 U.S. at 286. But the *Fordice* Court disagreed with the Ninth Circuit's revision of the relevant sentence: "The NVRA does not list, for example, all the other information the State may – or may not – provide or request." *Id*. The original panel in this case similarly analyzed this requirement and determined that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez I*, 485 F.3d at 1050-51.

It would also conflict with the decision of the Sixth Circuit in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (upholding requirement that voter

registration applicants provide valid social security numbers to register). "The NVRA does not specifically forbid use of social security numbers." *Id.*, 226 F.3d at 755.

The Ninth Circuit's reading of the "language and structure of the NVRA" conflicts with that in *Fordice* and *McKay*.

B. The Ninth Circuit Opinion Recognizes Only One of the Four Purposes of the NVRA.

The Ninth Circuit mentioned in passing that the NVRA has "four articulated purposes," *Gonzalez*, 677 F.3d at 403; Pet. App. 41c, but saw only one as controlling: "Proposition 200's registration provision is discordant with **the NVRA's goal** of streamlining the registration process." *Gonzalez IV*, 677 F.3d at 400 (emphasis added); Pet. App. 36c.

The use of the term "goal" (instead of "goals") of the NVRA is revealing. The NVRA was a balance of interests with more than one purpose, but the Ninth Circuit did not recognize most of them.

This "single-purpose" view of the NVRA is inconsistent with the statutory language and has been rejected by this Court. "In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process." *Crawford*, 553 U.S. at 192 (emphasis added). *See, also*, *Project Vote/Voting for America v. Long*, 682 F.3d 331, 334 (4th Cir. 2012)("Congress enacted the NVRA in order to 'increase the number of eligible citizens who register to vote' in federal elections, 'enhance[ ] the participation of eligible citizens as voters,' 'protect the integrity of the electoral process,' and 'ensure

that accurate and current voter registration rolls are maintained.'"); *Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009) ("Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained."); *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 391 (6th Cir. 2008) (NVRA has "dual objectives" of "increas[ing] the number of eligible citizens who register to vote in elections for federal office,' while also assuring that '*accurate and current* voter registration rolls are maintained." Emphasis in original.); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2nd Cir. 2000).

Each of the four statutory purposes of the NVRA includes a reference to eligibility, integrity or accuracy:

- to "increase the number of **eligible citizens** who register to vote";[14]
- to "enhance[] the participation of **eligible citizens** as voters";[15]
- to "**protect the integrity** of the electoral process";[16] and,
- to "ensure that **accurate and current** voter registration rolls are maintained."[17]

None of the highlighted terms fit into a singular "goal" of the NVRA, solely to "streamline" registration. The Second Circuit, for example, rejected an argument that defeat of an amendment by

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[14] 42 U.S.C. § 1973gg(b)(1) (emphasis added).

[15] 42 U.S.C. § 1973gg(b)(2) (emphasis added).

[16] 42 U.S.C. § 1973gg(b)(3) (emphasis added).

[17] 42 U.S.C. § 1973gg(b)(4) (emphasis added).

the NVRA conference committee was effective, in the face of statutory text, to show the controlling nature of the purpose of increasing voter registration opportunities. *Disabled in Action*, 202 F.3d at 127.

Each statutory purpose is inconsistent with an interpretation which permits only a signature requirement to account for eligibility concerns. Congress was apparently as interested in "protect[ing] the integrity of the electoral process," § 1973gg(b)(3), as in reduc[ing] state-imposed obstacles to federal registration.

"There is no question about the legitimacy or importance of the State's interest in counting **only the votes of eligible voters**. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for **carefully identifying all voters participating in the election process**." *Crawford*, 553 U.S. at 196 (emphases added). The *Crawford* analysis of the state's interests was not confined to the polling places, but seems to encompass the "election process." *Id.*

Protecting the integrity of the electoral process is necessary to the achievement of the other purposes. For example, Congress recognized that the integrity of the electoral process was crucial to "enhanc[ing] the participation of eligible citizens as voters." § 1973gg(b)(2). In an earlier proceeding in this case, the Court agreed with that approach: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see, also, John Doe No. 1 v. Reed*, ___ U.S. ___, ___, 130 S.Ct. 2811, 2819 (2010) ("The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce

fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government'", *citing, Purcell*, 549 U.S. at 4, and *Crawford*, 553 U.S. at 196).

By focusing solely on a singular "goal" of the NVRA, the Ninth Circuit conflicts with *Crawford* and other cases. The lower court's view does not appear to be supported by either the text of the statute or precedent. The Petition should be granted.

II. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE LEGITIMATE STATE INTERESTS CONFLICTS WITH OTHER COURTS' DECISIONS.

This Court, in *Purcell* and *Crawford*, established standards for reviewing the state interests underlying voter identification laws. The Ninth Circuit, on the other hand, simply announced, as part of its Elections Clause analysis, that "the Elections Clause affects only an area in which the states have no inherent or reserved power." *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

It is true that the Elections Clause looks to the Constitution to find state interests, *id.*, but that does not necessarily mean that the States have no interests to consider. The Ninth Circuit simply ignored the legitimate State interests long recognized by this Court, saying "Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns". *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

The States have long been viewed as having inherent rights to protect against voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford*, 553 U.S. at 196; *see also, Project Vote/Voting for America*, 682 F.3d at 340 ("State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible.").

Similarly, the State has a substantial interest in protecting voter confidence:

> Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Crawford, 553 U.S. at 197.

There are thus three specific state interests at stake, two involving prevention of voter fraud ("counting only the votes of eligible voters" and "orderly administration and accurate

recordkeeping"), and one involving the protection of public confidence in the integrity of the voting process by deterring fraud and "confirm[ing] the identity of voters." *Id.* Each of these three interests is implicated in this case and protected by the Arizona identification requirement.

As shown *supra*, each of the *Crawford* sources of evidence of voter fraud, 553 U.S. at 195, is present here: historical accounts; recent examples; and Arizona's own evidence of fraud significant enough to affect close elections. That evidence shows that Arizona's interest in preventing voter fraud is strong.

Arizona's separate, though related, concern about public confidence in the electoral system is also strong. In *Purcell*, an earlier part of this case, this Court, per curiam, said:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell, 549 U.S. at 4.

Arizona has perhaps one of the strongest indications that the public lacked confidence in the electoral system: Arizona's voters overwhelmingly voted to change the system and replace it with one in which they had more confidence. In response to increasing concerns about the level of voter fraud in Arizona and elsewhere, in 2004, the voters of Arizona adopted Proposition 200. "The measure sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to

present identification when they vote on election day." *Purcell*, 549 U.S. at 2; *see also, Santillanes*, 546 F.3d at 1323 ("The resolution submitting this measure to the voters echoes those [fraud] concerns.").

Yet, despite this Court's admonition that the lower courts engage in a factual investigation of, *inter alia*, "the prevalence and character of the fraudulent practices", the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court's Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

At a minimum, such an analysis seems to conflict with the interests recognized in *Purcell* and *Crawford*. It also conflicts with other Circuits' decisions, including the 11th Circuit's decision in *Common Cause/Georgia*, 554 F.3d at 1354-55, *quoting Burdick*, 504 U.S. at 440. "The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than 'sufficient to outweigh the limited burden' of producing [citizenship] identification." *Id.*

These State interests seem to be significant enough to be considered in any review of voter registration procedures. If the Court wishes to preserve these State interests, it should review this decision.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

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AMICUS CURIAE BRIEF

FILED
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DRIEF

No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, *ET AL.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In pertinent part, Arizona's Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote. ARIZ. REV. STAT. §16-166(F). The National Voter Registration Act of 1993 ("NVRA") requires the States to "accept and use" a voter-registration form developed by a federal agency, 42 U.S.C. §1973gg-4(a)(1), but also allows States to adopt their own forms, *id.* §1973gg-4(a)(2), which may include "such identifying information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* §1973gg-7(b)(1). Although Proposition 200 is consistent with a permissible construction of the NVRA, the Ninth Circuit rejected traditional preemption analysis – which requires clear congressional intent to preempt State law and includes a presumption against preemption – and instead applied a new form of heightened review for federal statutes implementing the Elections Clause, U.S. CONST. art. I, §4, cl. 1.

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, *ET AL.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both State and federal power. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged with the Clerk the parties' written consent to the filing of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This litigation concerns three fundamental issues in our democracy: (1) the fundamental right of citizens both to vote and to avoid dilution of their votes by non-citizens who fraudulently or mistakenly register to vote; (2) the division of power between the States and Congress on the fundamental issue of voter qualifications; and (3) the mechanisms that federal courts will use to weigh divisions between the States and Congress in our federalist system of dual sovereignty.

"[T]he political franchise of voting ... is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As this Court held when this litigation came here on an interlocutory appeal over the Ninth Circuit's preliminary injunction, non-citizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Voter fraud "'debase[s] or dilute[es] ... the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (*quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence). While "even rational restrictions on the right to vote [can be]

invidious if they are *unrelated to voter qualifications*, *Crawford*, 553 U.S. at 189 (emphasis added), Proposition 200 addresses the single-most fundamental voter qualification of all: citizenship. *Reynolds*, 377 U.S. at 554-55 (collecting cases). The idea that a federal law would seek to deter Arizona here is breathtaking.

As Madison explained at the Constitutional Convention, "'[t]he qualifications of electors and elected [are] fundamental articles in a Republican [Government] and ought to be fixed by the Constitution,'" and "'[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution.'" *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (*quoting* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249-50 (1911)) (Harlan, J., concurring in part and dissenting in part). Significantly, this litigation has demonstrated that the registration of unqualified non-citizen voters is prevalent in Arizona. (Gonzalez ER Tab 3 at 16.) *Amicus* Eagle Forum respectfully submits that concern over that actual subversion should override any concern over ambiguities in federal laws, which Congress easily can correct if Congress disagrees with Arizona's means of remedying that subversion or this Court's deference to Arizona's remedy.

Constitutional Background

Since the Founding, the Constitution's Elector-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each State. U.S. CONST.

art. I, §2, cl. 2.[2] In addition, the Elections Clause provides that State legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress [to] at any time by Law make or alter such Regulations." *Id.* art. I, §4, cl. 2. Under the Supremacy Clause, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof[,] ... shall be the supreme law of the land ..., anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Statutory Background

In 1993, Congress enacted the National Voter Registration Act, 42 U.S.C. §§1973gg to 1973gg-10 ("NVRA"), to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(a), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3). Although the NVRA also addresses registering in person and registering in conjunction with applying for a driver's license, 42 U.S.C. §§1973gg-2(a), 1973gg-3, 1973gg-5, this litigation concerns only NVRA's provisions for registration by mail. 42 U.S.C. §§1973gg-2(a)(2), 1973gg-4.

With respect to registration by mail, the NVRA directs the Election Assistance Commission to adopt a mail voter registration application form ("Federal Form"), 42 U.S.C. §1973gg-7(a)(2), which the States "shall accept and use." 42 U.S.C. §1973gg-4(a)(1). In

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[2] The Seventeenth Amendment extended this same requirement to voter qualifications for elections for Senators. U.S. CONST. amend. XVII, cl. 2.

addition, however, the States also may develop their own forms that meet the criteria of §1973gg-7(b). Chief among those criteria is the criterion that the form "may require only such identifying information ... and other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1).

In November 2004, the people of Arizona passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, which requires *inter alia* that applicants seeking to register to vote provide proof of U.S. citizenship in order to register to vote. ARIZ. REV. STAT. §16-166(F). Because Arizona is a "covered jurisdiction" for purposes of the federal Voting Rights Act, 42 U.S.C. §§1973-1973q, Arizona sought and received preclearance from the Department of Justice before Proposition 200 could take effect. *See Purcell*, 549 U.S. at 2-3.

In *Purcell*, this Court vacated a preliminary injunction against Proposition 200, finding that Arizona "indisputably has a compelling interest in preserving the integrity of its election process." 549 U.S. at 4 (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). In doing so, this Court noted that "the facts in these cases are hotly contested" and thus did not resolve any fact-based issues other than the Ninth Circuit's lack of an adequate basis for issuing a preliminary injunction. 549 U.S. at 5-6.

STATEMENT OF FACTS

The facts are not materially in dispute. The registration of non-citizens under the NVRA is a

significant problem. Pet. at 8. As Arizona explains in its petition, *id.*, in 2005, jury commissions in two counties identified approximately 200 non-citizens registered to vote. (Gonzalez ER Tab 3 at 16.) The Federal Form requires applicants to attest to their eligibility to register, but does not require proof of an applicant's attestation. Given the prevalence of non-citizen registration, further proof plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration" under the terms of 42 U.S.C. §1973gg-7(b)(1).

SUMMARY OF ARGUMENT

The Ninth Circuit's heightened deference to ambiguous federal legislation in an area of traditional State regulation conflicts not only with general preemption doctrines and federalism, Section I.A, *infra*, but also with at least two Elections Clause decisions of this Court. *See Ex parte Siebold*, 100 U.S. 371, 393 (1880); *U.S. v. Bathgate*, 246 U.S. 220, 225 (1918). Section I.B *infra*. More recently, the Sixth Circuit has recognized that the traditional canons of this Court's preemption jurisprudence – such as the presumption against preemption – apply to litigation under federal laws enacted pursuant to the Elections Clause. *Millsaps v. Thompson*, 259 F.3d 535, 537-39 (6th Cir. 2001). By adopting a heightened standard favoring preemption, the Ninth Circuit decision here splits with these authorities.

Although *amicus* Eagle Forum disagrees with this Court's fractured decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), on the authority of Congress under the Elections Clause to override the authority

of the States under the Elector-Qualifications Clause, that issue is not before this Court. But the very difficult nature of that decision requires the very opposite of the Ninth Circuit's actions here. If the Court is to develop a new, non-traditional form of preemption analysis under the Elections Clause, that new form of review should include even more deference to the States, not to Congress, given the fundamental nature of the sovereign issues involved. Section II, *infra*.

Finally, given the ambiguity in the NVRA, the standard of review – whether deferential to the States or to Congress – will determine the outcome. Section III, *infra*. While *amicus* Eagle Forum respectfully submits that Arizona should prevail, the bigger issue is that any new standard of review should come from this Court and apply nationwide, not from the Ninth Circuit, particularly in light of the split with the Sixth Circuit in *Millsaps*.

ARGUMENT

I. THE NINTH CIRCUIT'S HEIGHTENED TEST FOR PREEMPTION UNDER THE ELECTIONS CLAUSE VIOLATES THE CENTRAL TENETS OF FEDERALISM

The Ninth Circuit's heightened deference to federal regulation is altogether foreign to this Court's preemption analysis, which defers to the States to avoid assuming that Congress cavalierly would override the laws of another sovereign. In addition to running counter to this general spirit of dual sovereignty in our federalism, the Ninth Circuit's new test also runs counter to decisions of this Court

and the courts of appeals under the very Elections Clause that the Ninth Circuit seeks to reinterpret.

Federalism's central tenet permits and encourages state and local government authority:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Federalism requires rejecting the Ninth Circuit's heightened deference to Congress.

Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted). To avoid replacing either the States' autonomy on issues of State concern with federal commands or democratic legislative action with court

injunctions, this Court should reaffirm the principles that underlie its traditional preemption analysis by requiring clear and manifest preemptive intent from Congress and reviewing preemption claims with a presumption against preemption.

A. Federal Courts Review Preemption Claims Deferentially to States in Areas of Traditional State Concern and Regulation

As signaled above and throughout this Court's preemption doctrines, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth*, 555 U.S. at 565; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

As this Court has held, federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995) (*citing Maryland v. Louisiana*, 451 U.S. 725 (1981)). Of course, "never" means *never*, not "in all cases except ones under the Elections Clause."

Indeed, the Ninth Circuit's adoption of a special standard for preemption cases under the Elections Clause seems misplaced here. The States' power to set elector qualifications is not unlimited:

> [O]f course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, *or any other provision of the Constitution.*

Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (emphasis added). *Amicus* Eagle Forum respectfully submits that the Supremacy Clause – not the Elections Clause – provides the constitutional limit on which the plaintiffs here seek to rely to void Proposition 200. The NVRA predated Proposition 200 by ten years and does not purport to "make or alter" Proposition 200. *See* U.S. CONST. art. I, §4, cl. 2. Instead, the Supremacy Clause provides the basis for the plaintiffs' federal claims and therefore should dictate the standard of preemption analysis.

B. The Ninth Circuit's Heightened Test for Preemption under the Elections Clause Conflicts with Precedents of this Court and the Courts of Appeals

As indicated in the prior section, this Court's general preemption and sovereignty jurisprudence should have guided the Ninth Circuit to a different conclusion, assuming *arguendo* that this Court and other courts of appeals had not already reached the precise issue of preemption under the Elections Clause. But the Ninth Circuit's heightened test for preemption under the Elections Clause conflicts with both *Siebold* and *Bathgate*. Beyond ignoring this Court's decisions, the Ninth Circuit also has split with the Sixth Circuit on the standard of preemption review under the Elections Clause. This Court should grant the petition to review the Ninth Circuit's unprecedented creation of a heightened test for federal preemption in this area of traditional State concern.

In at least two Elections Clause decisions, this Court has applied traditional preemption analysis, requiring a clear federal statement and presuming that the federal government acted with deference to State laws. In *Siebold*, 100 U.S. at 393, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with State laws." Similarly, in *Bathgate*, 246 U.S. at 225-26, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections and

"consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." Both of these decisions negate a heightened form of preemption analysis like the one adopted by the Ninth Circuit here.

More recently, in *Branch v. Smith*, 538 U.S. 254 (2003), Justices Breyer and Souter joined Justice Stevens' partial concurrence, indicating that Congress must "clearly express[] its intent to repeal or to pre-empt" and weighing the presumption against preemption under the Elections Clause. *Id.* at 285 (Stevens, J., concurring in part and concurring in the judgment). Justice Thomas joined Justice O'Connor's partial dissent, indicating that the general rules of preemption and commandeering jurisprudence apply to the Elections Clause, just as they apply under the Commerce Clause and any other congressional power. *Id.* at 301-02 (O'Connor, J., concurring in part and dissenting in part). The plurality did not dispute these views so much as find them inapposite to the plurality's position.

In *Millsaps*, the Sixth Circuit relied on the Supremacy Clause – and thus traditional preemption analysis – to review the preemptive effect of federal legislation on the timing of elections enacted under the Elections Clause. *See Millsaps*, 259 F.3d at 537-39; *accord Love v. Foster*, 100 F.3d 413, 414-15 (5th Cir. 1996) (Dennis, J., dissenting from denial of rehearing *en banc*). The Ninth Circuit's heightened test for preemption under the Elections Clause squarely conflicts with the Sixth Circuit's decision in *Millsaps*, concerns an issue of State sovereignty that the Elector-Qualifications Clause directly confers on

the States, and relates to the fundamental right of citizens to vote without non-citizens' diluting that fundamental right. *Purcell*, 549 U.S. at 4. Moreover, unlike in *Purcell*, the facts now are clear, and Proposition 200 indeed seeks to rectify a significant problem of non-citizen registered voters in Arizona.

II. ANY PREEMPTION TEST TAILORED TO THE ELECTIONS CLAUSE SHOULD DEFER TO STATE AUTHORITY UNDER THE ELECTOR-QUALIFICATIONS CLAUSE

The Elector-Qualifications Clause vests each State with the authority to set the qualifications for federal elections in that State. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), however, a deeply divided Court held that the right of the States to set electors' qualifications for federal elections was subject to the power of Congress under the Elections Clause:

> In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed it advisable to do so.

Oregon, 400 U.S. at 119. *Amicus* Eagle Forum respectfully submits that the unmodified power of the States to set elector qualifications in one section of Article I is in no way subject to the limited power of Congress to regulate the "time, place, and manner" of elections in a different section of Article I. As Justice Harlan explained in his partial dissent for four justices, "[i]t is difficult to see how words could be clearer in stating what Congress can control and

what it cannot control" and "nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Oregon*, 400 U.S. at 210 (Harlan, J., concurring in part and dissenting in part). In the event that it will not revisit Oregon, this Court should nonetheless hold that when Congress exercises its Elections Clause authority to override the States' authority under the Elector-Qualifications Clause, Congress must do so expressly, subject to a rigorous presumption against preemption.

Writing for himself and four concurring justices, Justice Black quoted *U.S. v. Classic*, 313 U.S. 299, 315 (1941), for the proposition that the Elections Clause and the Necessary and Proper Clause trumped the States' powers under the Elector-Qualifications Clause:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states ... this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Oregon, 400 U.S. at 121 (*quoting Classic*, 313 U.S. at 315, alteration in *Oregon*). Justice Black then quoted *Smiley v. Holm*, 285 U.S. 355 (1932), for the proposition that congressional authority over the "times, places and manner of holding elections for senators and representatives ... embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to ... registration" among the "numerous requirements as to procedure and safeguards ... necessary ... to enforce the fundamental right involved." *Oregon*, 400 U.S. at 122 (*quoting Smiley*, 285 U.S. at 366). While each discusses congressional authority generally, neither *Classic* nor *Smiley* actually addresses the issue of whether congressional authority under Article I, Section 4 overrides the States' elector-qualification authority under Article I, Section 2.

Although *amicus* Eagle Forum agrees with Justice Harlan's *Oregon* dissent, Arizona has not asked this Court to reverse *Oregon* by removing Congress from setting voter qualifications. At the very least, however, this Court should recognize that the ambiguity of whether Congress even intended the NVRA to preempt State laws like Proposition 200, *see* Section III, *infra;* Pet. at 25-33, should weigh heavily against finding preemption here.[3] Clearly, this is an area of fundamental State concern and traditional State regulation since the Founding of this Nation. Moreover, if the Elections Clause applies

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[3] The Court did not need to address presumptions for or against preemption in *Oregon* because setting the voting age at 18 versus 21 did not present any ambiguity.

to limit the Elector-Qualifications Clause, Congress would retain the power to correct any perceived error that results from this Court's deference to the States. Thus, contrary to the Ninth Circuit, if federal courts should apply a new, non-traditional form of preemption jurisprudence under the Elections Clause, that jurisprudence should defer more strongly *to the States*, not against them as the Ninth Circuit would have it.

III. THE NVRA DOES NOT PREEMPT REQUIRING PROOF OF CITIZENSHIP IN ORDER TO REGISTER TO VOTE

As Chief Judge Kozinski explained in concurring with the Ninth Circuit's *en banc* decision, the NVRA's application here is susceptible to both Arizona's and the plaintiffs' interpretations. Pet. App. 89c. Arizona is perfectly capable of "accepting and using" the Federal Form without deeming it dispositive on the issue of U.S. citizenship. 42 U.S.C. §1973gg-4(a)(1). Moreover, given the demonstrated instances of non-citizens registering to vote, the additional proof that Arizona requires plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1). Under the circumstances, the outcome hinges on the standard of review for preemption cases like this.

Under the traditional preemption analysis, *see* Section I.A, *supra*, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group*,

555 U.S. at 77 (*quoting Bates*, 544 U.S. at 449). Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic*, 518 U.S. at 485. If federalism requires deference to the States as distinct sovereigns – as it would under traditional preemption doctrines – then Arizona must prevail. *Amicus* Eagle Forum respectfully submits that this Court must resolve this important issue, particularly given the split in authority with the Sixth Circuit. State authority over voter qualifications should be uniform nationwide, which cannot occur under a circuit split as wide as that dividing the Sixth and Ninth Circuits.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Dated: August 17, 2012

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AMICUS CURIAE BRIEF

MOTION FILED
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RECORD AND BRIEFS

No. 12-71

In The
Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2(b), Mountain States Legal Foundation ("MSLF"), respectfully moves for leave to file the accompanying amicus curiae brief in support of Petitioners, Arizona, *et al.* All parties to this matter have consented to the filing of this amicus curiae brief except Coconino County, Arizona.

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include individuals who live and work in every State of the Nation, including Arizona.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States. For example, MSLF has been actively involved in this case throughout its duration. On June 20, 2006, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, sought to intervene at the United States

District Court. After intervention was denied, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, appealed the denial of intervention and also filed an amicus curiae brief in support of Defendants. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). In the most recent appeal of this case, MSLF filed amicus curiae briefs with the panel and on rehearing en banc. *Gonzalez v. Arizona*, 624 F.3d 1162, 1168 (9th Cir. 2010); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc).

Here, MSLF wishes to highlight the fundamental principles of federalism and separation of powers, which are critically important to any analysis of federal preemption of State law. Though born as a compromise, federalism and separation of powers are essential elements in the system of checks and balances designed by the Framers to preserve liberty and State sovereignty. MSLF believes that the courts must consider and preserve the delicate balance between federal and State power in any preemption case, including preemption under the Elections Clause. In doing so, the courts must carefully consider the intent of Congress and construe State and federal statutes, if possible, to avoid conflict between the two.

MSLF submits that the Ninth Circuit ignored fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope and purpose of the Elections Clause. As a result, the Ninth Circuit created an ill-defined, amorphous, "harmonious operation" standard for Elections Clause preemption,

which is highly deferential to the federal government and in derogation of federalism principles. The Ninth Circuit's decision conflicts with the precedent of this Court and other Circuit Courts of Appeals.

Thus, MSLF urges that this Court grant the Petition for Certiorari to reemphasize and confirm the importance of federalism to the constitutional structure, and to reaffirm the States' compelling interest in maintaining the integrity of its State and federal electoral process. In doing so, this Court should correct the very wrong turn taken by the Ninth Circuit, thus preventing any other courts from following the missteps of the Ninth Circuit and further eroding individual liberty and unlawfully intruding into the affairs of the States and their citizens.

Though the Petition has touched on the federalism issues created by the Ninth Circuit's decision, MSLF brings a sharper focus to those principles and the Ninth Circuit's violation thereof. MSLF believes that this focus will be useful to this Court in determining whether to grant the Petition for Certiorari.

WHEREFORE, Mountain States Legal Foundation respectfully requests that this Court grant MSLF leave to participate as amicus curiae and to file the accompanying amicus curiae brief in support of Petitioners, Arizona, *et al.*

DATED this 15th day of August 2012.

Respectfully submitted,

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QUESTIONS PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's precedent and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requires persons who are registering to vote to show evidence that they are eligible to vote?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

[1] Pursuant to Supreme Court Rule 37.2, letters and emails indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties consent to filing of this amicus curiae brief except Coconino County, Arizona, and this brief is, therefore, appended to MSLF's Motion for Leave to File this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States.

Here, the Ninth Circuit ignored the fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope of the Elections Clause. MSLF believes that its focus on these issues will be useful to this Court in determining whether to grant the Petition for Certiorari.

INTRODUCTION

At issue here is whether certain provisions of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-1973gg-10, preempt certain provisions of Arizona's voter registration identification law. Pursuant to the NVRA, a Federal Mail Voter Registration Form ("Federal Form") was developed. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA directs the States to "accept and use" the Federal Form when registrations are submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2).

A State may, however, develop and use its own mail voter registration form that meets all of the

criteria stated in section 1973gg-7(b) for the registration of voters in elections for federal office. 42 U.S.C. § 1973gg-4(a)(2). The section 1973gg-7(b) criteria provides that a mail voter registration form "may require . . . identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

Section 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2). The Federal Form includes a statement specifying "each eligibility requirement (including citizenship)," 42 U.S.C. § 1973gg-7(b)(2)(A-B), and contains an "attestation that the applicant meets such requirement," signed "under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2)(C). Whether a State uses the Federal Form or its own form, the NVRA does not prevent a State from requiring more than this bare-bones minimum identifying information in order to assess the eligibility of an applicant for registration.

Arizona voters passed Proposition 200 in 2004. One provision of Proposition 200 required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. *Id.* A.R.S. § 16-166(F). Proposition 200 also requires the county recorder to reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. *Id.*

Following the implementation of Proposition 200, Arizona has continued to "accept and use" both the Federal Form and Arizona's Form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with both the Federal Form and the State Form, whichever the applicant selects. Petition at 6. In all respects, both the State and Federal Form incorporate the requirements of the NVRA. *Id.* The Arizona Secretary of State makes the Federal Form available to anyone who requests it. *Id.* In addition, that form is publicly available for downloading and printing. *Id.*

Thus, the issue below was whether Proposition 200, insofar as it requires more than an attestation under penalty of perjury to establish citizenship, or any other eligibility requirement, conflicts with the NVRA, and is, therefore, preempted. The Ninth Circuit erroneously held that Proposition 200's requirement that for confirmation of citizen status (A.R.S. § 16-166(F)) was preempted by the NVRA.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION ESTABLISHED A NEW PREEMPTION TEST THAT CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM.

A. Federalism Is Fundamental To The Liberty Of The People.

The principles of federalism embodied in the Constitution are fundamental to the government created by the Framers. The federal system resulted from a "compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3 (1988).

Federalism, together with separation of powers, is necessary to the preservation of liberty. "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). Federalism is also integral to the protection of liberty:

> In the compound republic of America, the power surrendered by the people, is *first divided between two distinct governments*, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a *double security arises to the rights of the people*. The different governments will

> controul (sic) each other; at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 291 (James Madison) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

The importance of the federal system to liberty was extolled by Alexander Hamilton as well:

> Power being almost always the rival of power, the General Government will at all times stand ready to *check the usurpations of the state governments; and those will have the same disposition towards the General Government*. . . . It may safely be received as an axiom in our political system that the *state government will in all possible contingencies afford complete security against invasions of the public liberty by the national authority*. Projects of usurpation cannot be masked.

THE FEDERALIST No. 28, at 149 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

Madison also explained that the federal system of dual sovereignty steered a safe passage between the perils of a large republic and the dangers of a small one. In large republics, Madison expounded that "the [federal] representative[s] [are] too little acquainted with . . . local circumstances and lesser interests." THE FEDERALIST No. 10, at 50 (James Madison) (Clinton Rossiter ed., Morgan 1999). In small republics, on the other hand, representatives may become "unduly

attached to these [local interests], and too little fit to comprehend and pursue great and national objects." *Id.* Madison concluded that the federal system created by the Framers "form[ed] a happy combination in this respect" and promoted wise legislation at both the national and local level; "the great and aggregate interests being referred to the national, the local and particular[,] to the state legislatures." *Id.*

Thus, most powers were reposed in the States, and only enumerated powers in the federal government:

> The powers delegated by the proposed Constitution to the Federal Government, are *few and defined*. Those which are to remain in the State Governments are *numerous and indefinite*. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The *powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State*.

THE FEDERALIST No. 45, at 260-61 (James Madison) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

Thus, in the federalist system, the States may regulate what concerns the liberties of the people. Regulation of the integrity of electoral systems, as demonstrated below, is essential to ensuring the

liberties of the people and is thus a compelling interest of every State. Therefore, if the federal government is to limit the ability of the State to protect the integrity of its elections, even for federal office, it must make its intent to do so manifestly clear or there must be a direct conflict between the federal enactment and that of the State.

Today, the federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of American citizens. Given these realities, State governments provide an increasingly important institutional check on potential abuses of federal power:

> [O]ur federal system provides a salutary check on governmental power. . . . [O]ur ancestors "were suspicious of every form of all-powerful central authority. To *curb this evil, they both allocated governmental power between state and national authorities*, and divided the national power among three branches of government. Unless we zealously protect these distinctions, *we risk upsetting the balance of power that buttresses our basic liberties*. In analyzing this brake on governmental power . . . the *diffusion of power between federal and state authority takes on added significance as the size of the federal bureaucracy continues to grow*."

F.E.R.C. v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting in part) (internal quotations omitted) (all emphasis added).

Accordingly, whenever there is a conflict between State and federal law, federalism considerations should be applied to preserve the delicate balance between the two sovereign interests, which preserves the liberty of the people.

B. The Ninth Circuit Created A New Federal Preemption Test That Is Highly Deferential To The Federal Government And Violates Fundamental Principles Of Federalism.

The Ninth Circuit ignored fundamental principles of federalism in determining that the NVRA, enacted pursuant to the Elections Clause, preempted Arizona's proof of citizenship requirements contained in Proposition 200 (A.R.S. § 16-166(F)). Instead, as demonstrated below, the Ninth Circuit ruled that federalism concerns apply only to preemption of State law under the Supremacy Clause, U.S. Const. art. VI, cl. 2,[2] not to preemption under the Elections Clause, U.S. Const. art. I, § 4, cl. 1.[3]

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[2] "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every states shall be bound thereby, any Thing in the Constitution notwithstanding."

[3] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The Ninth Circuit observed that preemption under the Supremacy Clause "must strive to maintain the delicate balance between the States and the Federal Government." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). On the other hand, the Ninth Circuit ruled that the right to regulate federal elections was not a right reserved to the States by the Tenth Amendment. *Gonzalez*, 677 F.3d at 392. According to the Ninth Circuit, only those sovereign rights that predated the Constitution could be reserved by the Tenth Amendment. *Id.*

Therefore, the Ninth Circuit ruled that, because Arizona's authority to regulate such elections "arises from the Constitution itself," not from any right of retained sovereignty preserved by the Tenth Amendment, a court "need not be concerned with preserving the 'delicate balance' between competing sovereigns" in determining preemption under the Elections Clause. *Id.* Indeed, the Ninth Circuit ruled that the Elections Clause is a "standalone preemption provision" and "establishes its own balance [between the State and federal government]. . . ." *Id.* Nothing could be less true or more destructive of liberty.

"Preemption may either be expressed or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Waste Management Association*, 505 U.S.

88, 98 (1992). This Court has recognized two types of implied preemption:

> [F]ield pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 98 (internal quotations and citations omitted).

There are "two cornerstones of . . . pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("ways in which federal law may pre-empt state law . . . turn on congressional intent"). The second cornerstone of pre-emption analysis is that "in *all* preemption cases" there is a presumption "that the *historic police powers* of the States were not to be superseded by [federal law] unless [this result] was the *clear and manifest purpose* of Congress." *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, (1947)) (emphasis added).

Importantly, there is a "presumption against pre-emption [that] is *rooted in the concept of federalism*."

Geier v. American Honda Motor Comp., Inc., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (emphasis added). This presumption serves to place preemption in the hands of Congress rather than the Judiciary:

> The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance ... and its requirement that Congress speak clearly when exercising that power.

Id. (internal quotations omitted).

Ignoring these principles, the Ninth Circuit proceeded, without considering Congressional intent or whether a conflict existed between the NVRA and Proposition 200, to create its own "harmonious operation" test for Elections Clause preemption:

> If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not *operate harmoniously in a single procedural scheme* for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

Id. at 394 (internal citations omitted). Thus, the Ninth Circuit substituted its own, ill-defined, amorphous, "harmonious operation" test which is highly

deferential to the federal government and in derogation of federalism principles.

To make matters worse, the Ninth Circuit gave no credence to Arizona's compelling interest in protecting the integrity of voting for legislators in State, local, and federal elections. As this Court has often observed:

> "A State *indisputably has a compelling interest in preserving the integrity of its election process.*" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). *Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.* Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (emphasis added).

Arizona is no less concerned with national elections for legislators to represent the interests of Arizona and its people than with State and local elections. Indeed, given the vast expansion of federal power into every aspect of life, Arizona must be

especially careful in assuring that those elected to the Senate and the House are elected fairly, and without fraud, by voters who are eligible to vote.

C. The Ninth Circuit Ignored The Purpose And Narrow Scope Of The Elections Clause, Which Incorporates Principles of Federalism.

The Ninth Circuit also failed to consider the very limited purpose and scope of the Elections Clause: leaving to the States the regulation of federal elections and reserving to the federal government only such power as might be necessary to protect its existence from abusive election regulations. U.S. Const. art. I, § 4, cl. 1. Thus, the "[Constitutional Convention] submitted the regulation of elections for the Federal Government in the first instance to the *local administrations*; which in ordinary cases, and when no improper views prevail, may be *both more convenient and more satisfactory*[.]" THE FEDERALIST No. 59, at 330-31 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) (emphasis added).

But the federal government also "*reserved* . . . a right to interpose, whenever *extraordinary circumstances* might render that interposition necessary to its own safety." *Id.* at 331 (emphasis added). Indeed, Hamilton described the right of the national legislature to regulate as one to be exercised only "in the *last resort*." *Id.* at 329 (emphasis added). Thus, the power to regulate elections remained with the States,

with only a residual power granted to the federal government for extraordinary circumstances. States were not entrusted with plenary control over federal elections only because "every government ought to contain in itself the means of its own preservation." *Id.* at 330.

The fear was that "state Legislatures, by forbearing the appointment of Senators, may destroy the national Government." *Id.* at 332. Consequently, as a last resort in extraordinary circumstances, the Elections Clause allows the federal government to invade the States' inherent authority over elections in order to alter or amend State election laws that threaten the federal government's very existence. *Millsaps v. Thompson*, 259 F.3d 535, 539 (6th Cir. 2001) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995)) ("[T]he Framers sought to curb the potential for abuses by the States and to give the nascent national government the power to preserve itself."). That is, without a reserved federal override, "the Framers feared that the existence of the federal government would depend upon the willingness of the States to hold federal elections." *Id.*

Thus, the original intent of the Framers was that the Elections Clause preserve the States' sovereignty to regulate elections. Congress would intrude on that sovereignty only minimally, and only then as a last resort in extraordinary circumstances. Thus, the Framers drafted the Elections Clause with an eye to maintaining the delicate balance between State and federal sovereignty.

Due to its failure to recognize the federalism principles inherent in the Elections Clause and the limited purpose and scope of that Clause, the Ninth Circuit arbitrarily created its own new preemption test that deferred to the federal government and rode roughshod over the sovereign interests of the State of Arizona, in derogation of principles of federalism.

D. The Ninth Circuit Ignored The Text And Purpose Of The NVRA And HAVA, Which Incorporate Principles Of Federalism.

Finally, the Ninth Circuit also ignored the text and purpose of the NVRA, coupled with the complementary Help America Vote Act ("HAVA"), 43 U.S.C. §§ 15301-15545, both of which reinforce the sovereignty of the States to regulate the integrity of the electoral process. The Ninth Circuit rightly observed that the NVRA's goal was to "streamline the registration process" and "make it easier to register to vote." *Gonzalez*, 677 F.3d at 400-01 (internal citations and quotations omitted). But the Ninth Circuit failed to mention the equally important NVRA goal of maintaining the integrity and accuracy of the voting registration system. Congress's stated purposes in enacting the NVRA were fourfold:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this

> subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to *protect the integrity of the electoral process*; and
>
> (4) to *ensure that accurate and current voter registration rolls* are maintained.

42 U.S.C. § 1973gg(b) (emphasis added).

HAVA complements this NVRA provision. HAVA requires that States keep computerized lists of registrants, that those lists be "*maintained on a regular basis*," specifies how the maintenance shall be performed, and mandates that the States' election systems "shall include provisions to ensure that voter registration records in the State are *accurate and updated regularly*," including "[a] system of file maintenance that makes a *reasonable effort to remove registrants who are ineligible* to vote from the official list of eligible voters." 42 U.S.C. § 15483(a)(2), (a)(4) (emphasis added).

The NVRA and HAVA together make it quite clear that maintaining an accurate, up-to-date list of voters by regularly purging those who have changed addresses or are ineligible to vote is critical. Thus, Arizona's efforts to register only eligible voters and to purge those who are not is consistent with and does not conflict with the same goal enunciated in the NVRA and HAVA. But the Ninth Circuit, in the same way that it ignored fundamental principles of

federalism, also failed to consider or address these important features of the NVRA and HAVA.

As the foregoing demonstrates, this Court should grant the Petition to correct the grave errors made by the Ninth Circuit, to prevent the adoption of *Gonzalez*'s Election Clause preemption test by other courts, and to reemphasize the importance of federalism to individual liberty.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.

A. The Ninth Circuit's Decision Conflicts With This Court's Prior Decisions In *Siebold* And *Foster*.

The Ninth Circuit principally relied on *Ex parte Siebold*, 100 U.S. 371 (1879) and *Foster v. Love*, 522 U.S. 67 (1997). *Gonzalez*, 677 F.3d at 393-94. These cases do not support the Ninth Circuit's ruling. Instead, the Ninth Circuit's ruling conflicts with these cases. Both these cases, contrary to the ruling of the Ninth Circuit, required that the exercise of Elections Clause power must *actually conflict* with State law for preemption to occur. For example, in *Siebold*, this Court held that "[w]hen [Congress] exercise[s] [its power under the Elections Clause], the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them." 100 U.S. at 384 (emphasis added). That is, Congress may

preempt State laws, but only "so far as the two are *inconsistent, and no farther*." *Id.* at 386 (emphasis added). *Siebold* cautioned that when Congress exercises its Elections Clause power, "we are bound to *presume that Congress has done so in a judicious manner*; that it has endeavored to *guard as far as possible against any unnecessary interference with State laws and regulations*. . . ." *Id.* at 393 (all emphasis added). *Siebold* recognized and applied principles of federalism and preserved the delicate balance of power between the States and the federal government, precisely what the Ninth Circuit specifically rejected.

Likewise, in *Foster*, this Court recognized that Congress's authority to regulate the time, place, and manner of federal elections is "paramount to those made by the State legislature." 522 U.S. at 69. But this Court then ruled that State laws "cease[] to be operative" only "if [the federal law] *conflict[s]* [with State law]," and only "*so far as the conflict extends*." *Id.* (emphasis added). Thus, *Foster*, like *Siebold*, applied principles of federalism to preserve the delicate balance between State and federal power.

Moreover, in Foster, this Court very liberally construed "election," a key term in that case, in order to avoid a conflict. This Court refused to "pars[e] the term 'election' . . . down to the definitional bone." *Id.* at 72. Instead, this Court held that "election" meant the "combined actions of voters and officials meant to make a final selection of an officeholder," so long as, "if an election takes place, it may not be consummated prior to federal election day." *Id.* at 71-72.

Unlike the approach of the Ninth Circuit, this Court's deliberate effort to construe a statute to avoid finding a conflict between State and federal law, if possible, acknowledges the important role of federalism in the interpretation of the Elections Clause.

The Ninth Circuit, instead of following the lead of this Court's decisions in *Siebold* and *Foster* – looking for a direct conflict between the NVRA and Proposition 200, and determining the extent of any such conflict – created its own "harmonious operation" test in which such a conflict between State and federal law plays no part. Astonishingly, the Ninth Circuit opined that it had reached its novel test by "reading *Siebold* and *Foster* together." *Gonzalez*, 677 F.3d at 394. The Ninth Circuit misunderstood both *Siebold* and *Foster* and its ruling is in direct conflict with both. This Court should grant the Petition to resolve this conflict.

B. The Ninth Circuit's Decision Conflicts With The Decisions Of Other Circuit Courts Of Appeals.

Unlike the Ninth Circuit in this case, four other Courts of Appeals, have properly followed principles of federalism in analyzing Elections Clause preemption. In *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985), the Seventh Circuit was confronted with whether the "Contested Elections Act," a federal ballot-counting provision, preempted State ballot-counting laws under the Elections Clause. Utilizing

Supremacy Clause analysis, the Seventh Circuit first ruled that none of the laws in question "so pervades the field that all competing principles of state law must yield." *Id.* at 1085. The Seventh Circuit then ruled that "a federal law preempts state law only when the two inevitably conflict or the law contains an explicit preemption clause," and, therefore, held that "the Contested Elections Act neither conflicts with nor expressly preempts state rules." *Id.* (citing to the Supremacy Clause preemption cases of *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)). Thus, *McIntyre* applied principles of federalism, as set out in Supremacy Clause preemption jurisprudence. The Ninth Circuit's decision is in direct conflict with *McIntyre*.

In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), the Sixth Circuit was asked to determine whether Tennessee's early voting system conflicted with federal statutes establishing certain days as federal election days. The Sixth Circuit noted that "under the Elections Clause, 'the states are given[] and in fact exercise wide discretion in the formulation of a system for choice by the people of representatives in Congress.'" *Id.* at 538 (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941)). Indeed, these "comprehensive words embrace authority [of the States] to provide a complete code for congressional elections." *Id.* at 539. This broad language empowers States "to enact numerous requirements as to procedure and safeguards which experience shows are necessary in

order to enforce the fundamental right involved," which include "prevention of fraud and corrupt practices."[4] *Id.*

The Sixth Circuit then analyzed the Elections Clause preemption allegation by utilizing Supremacy Clause precedent. First, the Sixth Circuit ruled that "'[w]hether federal law preempts state law turns principally on congressional intent.'" *Id.* at 538 (quoting *Northwest Cen. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)). In doing so, the Sixth Circuit started with "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[5] *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

---

[4] This ruling follows the original intent of the Framers that the Elections Clause conferred on the federal government only a limited residuary power to be utilized only as a last resort in extraordinary circumstances. *See* THE FEDERALIST No. 59, *supra*. It also reinforces the concept that control of elections, particularly the prevention of fraud and corrupt practices, has always been a power retained by the States to protect the liberty of their people and the fundamental right to vote in a representative democracy and to have one's vote count without illegal dilution. *See* THE FEDERALIST No. 45, *supra*.

[5] This once again reinforces the proposition that maintaining integrity by rooting out fraud and corruption in elections is a traditional power of the States, whether those elections are State, local, or federal.

The Sixth Circuit went on to note that a federal law preempts State law "when the two *actually conflict*" which occurs when "'compliance with both federal and state regulations is a physical impossibility,'" or when a State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting for the first proposition *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and for the second, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). In holding that there was no Elections Clause preemption, the Sixth Circuit observed that "all courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes." *Id.* at 545. Thus, *Millsaps properly* upholds and applies principles of federalism. The Ninth Circuit's ruling is in direct conflict with *Millsaps*.

The Fifth Circuit, without mentioning the Supremacy Clause, utilized much the same analysis as *McIntyre* and *Millsaps* in analyzing Elections Clause preemption: "[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (emphasis added). Thus, *Gonzalez* also directly conflicts with *Bomer*.

To similar effect is *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). There, the United States contended that Missouri failed to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of [death or change in residency]," pursuant to the NVRA. *Id.* at 846. Missouri defended, arguing that "although Congress has authority to disrupt the federal/state balance of authority over elections, in order to do so, Congress 'must make its intention to do so unmistakably clear in the language of the statute (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)).'" *Id.* at 850 n.2. The United States responded by offering the argument accepted by the *Gonzalez* court, that "the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states" and is, therefore, not subject to principles of federalism. *Id.* The Eighth Circuit, however, rejected the United States' argument:

> We . . . recognize regulation of federal elections could not have been technically reserved to the states by the Tenth Amendment, when such federal elections did not exist before the Constitution was established. . . . [A]lthough the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states . . . which existed before the Constitution was established, the text of the Elections Clause may arguably describe the *usual constitutional balance between the States and the Federal*

> *Government*. . . . If Congress intends to alter [that balance], it must make its intention to do so unmistakably clear in the language of the statute.

Id. (internal citations and quotations omitted) (emphasis added).

The Eighth Circuit did not ultimately decide this issue because it determined that the plain language of the statute did require Missouri to conduct a program to purge voters who had died or changed addresses: "[W]e need not decide whether the plain statement rule applies in the context of the Elections Clause [because] the NVRA utilizes the mandatory 'shall' followed by an active verb, requiring the states to 'conduct a general program.'" *Id.* Thus, there is "no ambiguity in Congress's intent[.]" *Id.* *Missouri* does, however, taken together with *Siebold*, *Foster*, *McIntyre*, *Millsaps*, and *Bomer*, illustrate that the Ninth Circuit stands alone in its reasoning and its abandonment of fundamental principles of federalism.

As the foregoing demonstrates, this Court should grant the Petition for Certiorari to resolve the split in the Circuit Courts of Appeals created by the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Certiorari.

Dated this 15th day of August, 2012.

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JOINT APPENDIX

No. 12-71

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In The Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC. and JESUS M. GONZALEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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U.S. District Court
DISTRICT OF ARIZONA (Phoenix Division)
CIVIL DOCKET FOR CASE #: 2:06-cv-01268-ROS

Date Filed	#	Docket Text
05/09/2006	1	COMPLAINT, filed by Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol. (Attachments: # 1 Part 2 of Complaint for Declaratory & Injunctive Relief)(Perales, Nina) (Entered: 05/09/2006)
05/09/2006	3	APPLICATION re: Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction by Plaintiff Maria M Gonzalez. (Attachments: # 1 Text of Proposed Order for Plaintiffs' Ex Parte Application for Temporary Restraining Order)(Perales, Nina) (Entered: 05/09/2006)
05/09/2006	5	MEMORANDUM re: MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER re 3 Application, *for Temporary Restraining Order* by Plaintiff Maria M Gonzalez.

		(Attachments: # 1 Part 2 to Memorandum of Points & Authoritiez [sic] in Support of Plaintiffs Application for TRO# 2 Exhibit A Part 1# 3 Exhibit A – Part 2# 4 Exhibit A – PART 3# 5 Exhibit A – PART 4# 6 Exhibit A – PART 5# 7 Exhibit A – PART 6# 8 Exhibit A – PART 7# 9 Exhibit A – PART 8# 10 Exhibit A – PART 9# 11 Exhibit B# 12 Exhibit C)(Perales, Nina) (Entered: 05/09/2006)
05/09/2006	7	MOTION for Preliminary Injunction *Under the 14th & 24th Amendments to the US. Constitution and Memorandum in Support* by Maria M Gonzalez. (Perales, Nina) (Entered: 05/09/2006)
05/11/2006	10	ORDER REASSIGNING CASE. Case reassigned to Judge Roslyn O Silver by random lot for all further proceedings. Judge Neil V Wake no longer assigned to case. All future pleadings and papers shall bear the following case number: CV-06-1268-PHX-ROS. Signed by Judge Neil V Wake on 05/11/06. (DNH,) (Entered: 05/11/2006)
05/12/2006	16	Minute Entry for proceedings held before Judge Roslyn O Silver: In-Court hearing held on 5/12/2006. Status Hearing set for 5/17/2006 at 03:00 PM before Judge Roslyn

		O Silver. (Court Reporter David Lee.) (KFZ) (Entered: 05/19/2006)
05/16/2006	13	MOTION for Temporary Restraining Order *in the Alternative* by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Affidavit Certification of Nina Perales in Support of Plaintiffs Ex Parte Application for a Temporary Restraining Order# 2 Text of Proposed Order)(Perales, Nina) (Entered: 05/16/2006)
05/17/2006	26	Minute Entry for proceedings held before Judge Roslyn O Silver: Status Conference held on 5/17/2006. Oral argument set for 6/9/2006 at 08:30 AM before Judge Roslyn O Silver. (Court Reporter David Lee.) (KFZ) (Entered: 05/25/2006)
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05/24/2006	21	Joinder re 20 MOTION to Consolidate Cases *Motion to Consolidate and Transfer Joinder in Gonzalez Plaintiffs' Ex Parte Application for TRO and OSC* by Movant The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit Index, Exhibit 1 and Exhibit A# 2 Exhibit Exhibit B# 3 Exhibit Exhibit C – G# 4 Exhibit Exhibit H-M)(Rosenbaum, David) (Entered: 05/24/2006)
05/31/2006	27	RESPONSE in Opposition re 13 MOTION for Temporary Restraining Order *in the Alternative* filed by Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Exhibit One# 2 Exhibit Two# 3 Exhibit Three, Pt. One 4 Exhibit Three, Pt. Two# 5 Exhibit Three, Pt. Three# 6 Exhibit Three, Pt. Four# 7 Exhibit Three, Pt. Five# 8 Exhibit Three, Pt. Six# 9 Exhibit Three, Pt. Seven# 10 Exhibit Three, Pt. Eight# 11 Exhibit Three, Pt. Nine# 12 Exhibit Three, Pt. Ten# 13 Exhibit Three, Pt. Eleven# 14 Exhibit Four) (Silverman, Peter) (Entered: 05/31/2006)
06/01/2006	28	ORDER re 20 MOTION to Consolidate Cases and Transfer by The Inter Tribal Council of Arizona, Inc (Attachments: # 1 #

		2)(Rosenbaum, David) filed by The Inter Tribal Council of Arizona, Inc. That any party opposing ITCA Plas' Motion to Consolidate shall do so no later than Noon on 6/2/06. FURTHER ORDERED that the expedited briefing schedule set forth on 5/17/06 remains intact. FURTHER ORDERED that the Clerk shall docket this Order in both cases to ensure that all parties receive notice. FURTHER ORDERED that should the matters be consolidated, all parties shall appear at the TRO hearing on 6/9/06 . Signed by Judge Roslyn O Silver on 5/31/06. (KMG,) (Entered: 06/01/2006)
06/05/2006	31	REPLY to Response to Motion re 13 MOTION for Temporary Restraining Order *in the Alternative* filed by The Inter Tribal Council of Arizona, Inc.. (Hartman, Karen) (Entered: 06/05/2006)
06/05/2006	32	REPLY to Response to Motion re 13 MOTION for Temporary Restraining Order *in the Alternative* filed by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por

		La Causa. (Perales, Nina) (Entered: 06/05/2006)
06/06/2006	33	CONSOLIDATION ORDER – LEAD CASE (Member case: CV 06-1362-PCT-JAT) That the ITCA Plas' Motion to Consolidate (Doc.#20) is granted. All future filings in Inter Tribal Council of Arizona, et al., v. Brewer, Case No. CV 06-1362, shall be filed in CV 061268; FURTHER ORDERED that the ITCA Plas will ber [sic] permitted to participate in the expedited briefing schedule set forth on 5/17/06; FURTHER ORDERED that all parties shall appear at the TRO hearing on 6/9/06. Signed by Judge Roslyn O Silver on 6/6/06. (KMG,). (Entered: 06/06/2006)
06/09/2006	64	Minute Entry for proceedings held before Judge Roslyn O Silver: Temporary Restraining Order Hearing held on 6/9/2006. Court takes the matter under advisement. (Court Reporter David Lee.) (KFZ) (Entered: 06/15/2006)
06/13/2006	63	*County Defendants* ANSWER to Complaint *Gonzales, et al.* by Helen Purcell.(Connor, M) (Entered: 06/13/2006)
06/19/2006	66	ANSWER to Complaint *of Maria Gonzalez, et al.* by Jan Brewer,

		STATE OF ARIZONA.(Silverman, Peter) (Entered: 06/19/2006)
06/19/2006	67	ANSWER to Complaint *of Inter Tribal Council of Arizona, Inc., et al.* by Jan Brewer.(Silverman, Peter) (Entered: 06/19/2006)
06/19/2006	68	ORDER denying 13 Motion for TRO; Preliminary Injunction Hearing is set for 7/19/06 and 7/20/06 at 9:00am; pla's shall submit briefing on the preliminary injuction [sic] issues by 6/30/06; dft's shall file their response by 7/7/06 and pla's reply by 7/14/06. Signed by Judge Roslyn O Silver on 6/19/06. (SBU) (Entered: 06/19/2006)
06/19/2006	69	ANSWER to Complaint *Inter Tribal Council of Arizona* by Helen Purcell. (Connor, M) (Entered: 06/19/2006)
06/20/2006	72	MOTION to Intervene by Yes on Proposition 200. (KMG,) (Entered: 06/23/2006)
06/20/2006	75	ANSWER to Complaint by Yes on Proposition 200.(KMG,) (Entered: 06/23/2006)
06/20/2006	76	ANSWER to Complaint (CV 06-1362-PHX-JAT) by Yes on Proposition 200.(KMG,) (Entered: 06/23/2006)

06/23/2006	81	ORDER pending before the Court is a 72 MOTION to Intervene by Yes on Proposition 200. If either plas or dfts wish to respond to this motion, the response is due 7/28/06. The reply by proposed intervenors is due 7/30/06 Signed by Judge Roslyn O Silver on 6/23/06. (KMG,) (Entered: 06/23/2006)
06/26/2006	82	Joint MOTION for Extension of Time to Modify Schedule for Preliminary Injunction and for Expedited Discovery by Friendly House, The Inter Tribal Council of Arizona, Inc., Jesus Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Exhibit A# 2 Text of Proposed Order Proposed Scheduling Order)(Hartman, Karen) (Entered: 06/26/2006)
06/28/2006	90	TRANSCRIPT of Application re temporary restraining order

		during Proceedings held on 6/9/06 before Judge Roslyn O Silver. Court Reporter: David M Lee. (BAS,) (Entered: 06/28/2006)
06/29/2006	98	Minute Entry for proceedings held before Judge Roslyn O Silver: Telephone Conference held on 6/29/2006. (Court Reporter David Lee.) (KFZ) (Entered: 07/06/2006)
06/30/2006	92	MOTION to Consolidate Cases by Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Text of Proposed Order)(Silverman, Peter) (Entered: 06/30/2006)
07/12/2006	104	RESPONSE in Opposition re 72 MOTION to Intervene filed by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Hartman, Karen) (Entered: 07/12/2006)
07/17/2006	110	REPLY to Response to Motion re 72 MOTION to Intervene filed by Yes on Proposition 200. (Spector, Joel) (Entered: 07/17/2006)
07/19/2006	117	REPLY to Response to Motion re 92 MOTION to Consolidate Cases *and Transfer* filed by STATE OF

		ARIZONA. (Richards, William) (Entered: 07/19/2006)
07/21/2006	118	Notice re Notice of Appearance and Notice of Withdrawal from Common Representation by Candace Owens, Patty Hansen (Wilcox, Jean) (Entered: 07/21/2006)
08/04/2006	142	CONSOLIDATION ORDER – LEAD CASE: IT IS ORDERED the Motion to Intervene 72 is denied. IT IS FURTHER ORDERED the Motion to Transfer and Consolidate 92 is granted. Case number CV 06-1575-PHX-EHC shall be transferred to this Court and consolidated with case number CV 06-1268-PHX-ROS. Signed by Judge Roslyn O Silver on 8/2/06. (Attachments: # 1)(TLJ) (Entered: 08/04/2006)
08/04/2006	145	MOTION for Leave to File ITCA's Motion for Leave to Exceed Page Limitation re Preliminary Injunction Motion by The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit Exhibit A ITCA's Motion for Preliminary Injunction# 2 Exhibit Exhibit List, Ex. 1-5# 3 Exhibit Exhibit 6-8# 4 Exhibit Exhibit 9-12# 5 Exhibit Exhibiti [sic] 13-18# 6 Exhibit Exhibit 19-24# 7 Exhibit Exhibit 25-32# 8 Exhibit Exhibit 33-39# 9

		Exhibit Exhibit 40-44# 10 Exhibit Exhibit 45-50)(Rosenbaum, David) (Entered: 08/04/2006)
08/04/2006	146	Supplemental MOTION for Preliminary Injunction by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Perales, Nina) (Entered: 08/04/2006)
08/04/2006	147	Additional Attachments to Main Document re 145 MOTION for Leave to File ITCA's Motion for Leave to Exceed Page Limitation re Preliminary Injunction Motion by Plaintiff The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit 52-58# 2 Text of Proposed Order Proposed Order) (Rosenbaum, David) (Entered: 08/04/2006)
08/08/2006	148	ORDER granting in part and denying in part 145 Motion to Exceed Page Limitation. ITCA's Preliminary Injunction Motion must be no more than 40 pages. IT IS FURTHER ORDERED ITCA shall file its Preliminary Injunction Motion by 8/8/06. All other dates remain in effect. . Signed by Judge Roslyn O Silver

		on 8/7/06. (LCF) (Entered: 08/08/2006)
08/09/2006	149	MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* by The Inter Tribal Council of Arizona, Inc.. (Rosenbaum, David) (Entered: 08/09/2006)
08/09/2006	150	Additional Attachments to Main Document re 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* by Plaintiff The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit Index and 1-5# *?* Exhibit 6-8# 3 Exhibit 9-12# 4 Exhibit 13-18# 5 Exhibit 19-24# 6 Exhibit 25-32# 7 Exhibit 33-39# 8 Exhibit 40-44# 9 Exhibit 45-50# 10 Exhibit 51# 11 Exhibit 52-58)(Rosenbaum, David) (Entered: 08/09/2006)
08/11/2006	152	NOTICE OF APPEAL – Interlocutory to 9th Circuit, as to 142 Consolidation Order – LEAD CASE ONLY!, by Yes on Proposition 200. Filing fee $ 455. (Attachments: # 1 Supplement Civil Appeals Docketing Statement# 2 Supplement Docketing Statement Certificate of Service)(Spector, Joel) Modified on 8/15/2006 (DMT,) TEXT MODIFIED TO ADD

		"INTERLOCUTORY". (Entered: 08/11/2006)
08/11/2006	153	Representation Statement by Yes on Proposition 200 re 152 Notice of Appeal, (Spector, Joel) (Entered: 08/11/2006)
08/11/2006	154	Appeal Document by Yes on Proposition 200 re 152 Notice of Appeal, *Notice of No Transcripts* (Spector, Joel) (Entered: 08/11/2006)
08/14/2006	155	MOTION for Leave to File Leave to file Amici Curiae by Amicus Curiae. (Attachments: # 1 Exhibit Proposed Brief 2 Text of Proposed Order) Proposed Order)(Montgomery, Dan) (Entered: 08/14/2006)
08/15/2006	157	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit and all parties re 152 Notice of Appeal, Interlocutory (DMT,) (Entered: 08/15/2006)
08/16/2006	158	RESPONSE in Opposition re 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* filed by Helen Purcell. (Attachments: # 1 Exhibit List# 2 Exhibit 1 Affidavit# 3 Exhibit 2a Voter Registration# 4 Exhibit 2b Identification at Polls)(Connor, M) (Entered: 08/16/2006)

08/16/2006	159	MOTION for Leave to File Excess Pages by Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Exhibit State's Response# 2 Exhibit 1 to Response# 3 Exhibit 2 to Response #4 Exhibit 3 to Response #5 Exhibit 4 to Response# 6 Exhibit 5 to Response# 7 Exhibit 6 to Response# 8 Exhibit 7 to Response# 9 Exhibit 8 to Response)(Silverman, Peter) (Entered: 08/16/2006)
08/16/2006	160	RESPONSE to Motion re 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* filed by Candace Owens, Patty Hansen. (Wilcox, Jean) (Entered: 08/16/2006)
08/17/2006	161	ORDER – A Preliminary/Permanent Injunction Hearing is set for 8/30/2006 and 8/31/2006 at 9:00A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. This hearing is RESET to 8/30/2006 at 9:00A.M. and 8/31/2006 at 11:00A.M. THIS IS A TIME CHANGE ONLY!! Signed by Judge Roslyn O Silver on 08/17/2006. (ROS,)text order only – no pdf attached (Entered: 08/17/2006)
08/23/2006	164	MOTION for Leave to File ITCA's Motion for Leave to Exceed Page Limitation for Reply in Support of

		Motion for Preliminary Injunction by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Attachments: # 1 Exhibit A (Reply in Support of ITCA's Motion for Preliminary Injunction)# 2 Text of Proposed Order Proposed Order)(Hartman, Karen) (Entered: 08/23/2006)
08/25/2006	166	MOTION for Leave to File Navajo Nation and Agnes Laughter's Motion for Leave to Exceed Page Limitation for Reply in Support of Motion for Preliminary Injunction by Agnes Laughter, Navajo Nation. (Attachments: # 1 Appendix Index to Exhibits# 2 Exhibit 100# 3 Exhibit 101# 4 Exhibit 102# 5 Exhibit 103# 6 Exhibit 104# 7 Exhibit 105# 8 Exhibit 106# 9 Exhibit 107# 10 Exhibit 108# 11 Exhibit 109# 12 Exhibit 110# 13 Exhibit 111# 14 Exhibit 112# 15 Exhibit 113# 16 Exhibit Attachment A# 17 Exhibit Attachment B# 18 Exhibit Attachment C# 19 Text of Proposed Order Proposed Order# 20 Exhibit Navajo Nation and Agnes Laughter's Reply in Support of Motion for Preliminary

Injunction)(Ferguson, Patricia) (Entered: 08/25/2006)

08/25/2006 167 REPLY in Support re 7 MOTION for Preliminary Injunction *Under the 14th & 24th Amendments to the U.S. Constitution and Memorandum in Support by Gonzalez Plaintiffs* filed by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Exhibit) (Perales, Nina) (Entered: 08/25/2006)

08/25/2006 169 SUPPLEMENT of Citation to Supplemental Authority re 159 MOTION for Leave to File Excess Pages *Supplement Citation to Opposition to Motion for Preliminary Injunction* by Defendants Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Supplement Supplemental Citation)(Skolnik, Bruce) (Entered: 08/25/2006)

08/29/2006 172 ORDER re 161 ORDER setting preliminary injunction hearing; ORDERED that the parties are to meet and confer regarding the content and schedule of the preliminary injunction hearing; the parties are to submit a joint status

report to the Court by 3 p.m. on 8/29/06 setting forth the following: (1) a proposed schedule for the preliminary injunction hearing; (2) the identity of the proposed witnesses and the content of each witnesses testimony; and (3) the material facts that remain in dispute; FURTHER ORDERED witnesses will be allowed only if there are material issues of fact such as credibility issues; FURTHER ORDERED each side will be alloted one hour for oral argument. Signed by Judge Roslyn O Silver on 8/29/2006. (LAD) (Entered: 08/29/2006)

08/29/2006 174 BRIEF re 146 Supplemental MOTION for Preliminary Injunction, 7 MOTION for Preliminary Injunction *Under the 14th & 24th Amendments to the U.S. Constitution and Memorandum in Support*, 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* filed by Protect Arizona Now, Washington Legal Foundation as amici curiae. (DMT,) (Entered: 08/29/2006)

08/29/2006 175 RESPONSE in Opposition re 146 Supplemental MOTION for Preliminary Injunction, 7 MOTION for Preliminary Injunction *Under*

		the 14th & 24th Amendments to the U.S. Constitution and Memorandum in Support, 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* filed by Secretary of State Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 exh.1 #(2) exh2 #(3) exh3 #(4) exh4 #(5) exh5 #(6) exh6 #(7) exh7 #(8) exh8)(DMT,) (Entered: 08/29/2006)
08/29/2006	176	REPLY in Support re 149 MOTION for Preliminary Injunction *ITCA Plaintiffs' Motion for Preliminary Injunction* filed by The Inter Tribal Council of Arizona, Inc.. (DMT,) (Entered: 08/29/2006)
08/29/2006	177	STATUS REPORT *JOINT STATUS REPORT* by The Inter Tribal Council of Arizona, Inc.. (Rosenbaum, David) (Entered: 08/29/2006)
08/30/2006	178	Minute Entry for proceedings held before Judge Roslyn O Silver: Preliminary Injunction Hearing held on 8/30/2006 and continued to 8/31/2006. (Court Reporter David Lee.) (KFZ) (Entered: 09/01/2006)
08/31/2006	181	Minute Entry for proceedings held before Judge Roslyn O Silver: Preliminary Injunction Hearing held on 8/31/2006. (Court Reporter

		David Lee.) (KFZ) (Entered: 09/07/2006)
09/11/2006	183	ORDER denying 146 Motion for Preliminary Injunction.; Denying 149 Motion for Preliminary Injunction.; Granting 166 Motion to Exceed Page Limits.; Denying 7 Motion for Preliminary Injunction.; FURTHER ORDERED the Motion for Preliminary Injunction and Motion to Expedite (06-1575; Doc. 2, 14) are DENIED.; FURTHER ORDERED the parties are to submit simultaneous briefing on whether the identification requirements for registration constitute a poll tax by 9/18/06. Simultaneous responses are due 9/25/06. No replies are allowed. FURTHER ORDERED the Navajo Nation Plaintiffs are to submit additional briefing on their Voting Rights Act and Civil Rights Act claims by 9/25/06. Defendants' response is due 10/2/06. The reply is due 10/6/06. A hearing for the Court to consider additional facts on the Voting Rights Act and Civil Rights Act claims will be held 10/19/06 at 9:00 a.m. before Judge Silver . Signed by Judge Roslyn O Silver on 9/11/06. (LCF) (Entered: 09/11/2006)

09/11/2006	184	NOTICE OF APPEAL to 9th Circuit – Interlocutory, as to 183 Order on Motion for Preliminary Injunction,Order on Motion for Leave to File, by Maria M Gonzalez. Filing fee $ 455. (Attachments: # 1 Civil Appeals Docketing Statement) (Perales, Nina) Modified on 9/12/2006 DOCKET TEXT MODIFIED TO ADD "INTERLOCUTORY" (REW,). (Entered: 09/11/2006)
09/12/2006	189	NOTICE OF INTERLOCUTORY APPEAL to 9th Circuit as to 183 Order on Motion for Preliminary Injunction,,,,,,,,Order on Motion for Leave to File,,,,,,,, by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. Filing fee $ 455. (Attachments: # 1 Exhibit Representation Statement)(Hartman, Karen) (Entered: 09/12/2006)
09/14/2006	194	MOTION to Expedite Issuance of Findings of Fact and Conclusions of Law by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League

		of Women Voters of Arizona, People For the American Way Foundation. (Hartman, Karen) (Entered: 09/14/2006)
09/15/2006	200	2100 TRANSCRIPT filed for hearing on Preliminary Injunction Hearing Day 1 for dates of 08/30/06 before Judge Roslyn O Silver. Court Reporter, David M Lee. Re 152 Notice of Appeal,, 189 Notice of Appeal – Interlocutory., 184 Notice of Appeal, (BAS,) (Entered: 09/22/2006)
09/15/2006	201	TRANSCRIPT filed for hearing on Prelliminary [sic] Injunction Hearing Day 2 for dates of 8/31/06 before Judge Roslyn O Silver. Court Reporter: David M Lee. Re 152 Notice of Appeal,, 189 Notice of Appeal – Interlocutory., 184 Notice of Appeal, (BAS,) (Entered: 09/22/2006)
09/18/2006	195	Notice re County Defendants' Non-Participation in Substantive Briefing by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne,

		Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Agnes Laughter, Navajo Nation, Allen Tempert, Ann Wayman-Trujillo, Wendy John (Connor, M) (Entered: 09/18/2006)
09/18/2006	196	MEMORANDUM re: Additional Briefing Requested by Court by Defendants Jan Brewer, STATE OF ARIZONA. (Silverman, Peter) (Entered: 09/18/2006)
09/18/2006	197	MEMORANDUM re: Supplemental Brief in Support of Motion for Preliminary Injunction by Plaintiffs Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Perales, Nina) (Entered: 09/18/2006)
09/18/2006	198	MEMORANDUM re: ITCA Plaintiffs' Supplemental Brief re Poll Tax by Plaintiffs The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Attachments: # 1

Exhibit 72) (Hartman, Karen) (Entered: 09/18/2006)

09/25/2006 203 MOTION to Stay Court's Order Pending Appeal *ITCA's Motion for Injunction Pending Appeal* by The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit A# 2 Text of Proposed Order) (Rosenbaum, David) (Entered: 09/25/2006)

09/25/2006 204 RESPONSE by Defendant Helen Purcell. (Attachments: # 1 Exhibit Exhibits 1 and 2)(Connor, M) (Entered: 09/25/2006)

09/25/2006 205 MOTION to Supplement *Brief Regarding Voting Rights Act and Civil Rights Act* by Agnes Laughter, Navajo Nation. (Attachments: # 1 Appendix Index of Exhibits to Supplemental Brief# 2 Exhibit Ex 120# 3 Exhibit Ex 121# 4 Exhibit Ex 122# 5 Exhibit Ex 123# 6 Exhibit Ex 124# 7 Exhibit Ex 125# 8 Exhibit Ex 126# 9 Exhibit Ex 127# 10 Exhibit Ex 128)(Dworkin, Judith) (Entered: 09/25/2006)

09/25/2006 206 MEMORANDUM re: Responsive Brief Regarding Poll Tax Claim by Defendants Jan Brewer, STATE OF ARIZONA. (Silverman, Peter) (Entered: 09/25/2006)

09/25/2006 207 RESPONSE *In Opposition To Additional Briefing By The State Of Arizona And Arizona Secretary*

		Of State by Plaintiffs The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Hartman, Karen) (Entered: 09/25/2006)
10/04/2006	213	MEMORANDUM re: Responsive Brief Regarding Navajo Plaintiffs' Claims by Defendant Jan Brewer. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit)(Silverman, Peter) (Entered: 10/04/2006)
10/10/2006	215	RESPONSE to Motion re 211 MOTION for Clarification, 214 MOTION for Expedited Motion for Extension of Time to File an Appeal and Request for Status Conference filed by Jan Brewer. (Silverman, Peter) (Entered: 10/10/2006)
10/10/2006	216	Notice re Withdrawal of Motion for Injunction Pending Appeal by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation re 203 MOTION to Stay Court's Order

		Pending Appeal *ITCA's Motion for Injunction Pending Appeal* (Hartman, Karen) (Entered: 10/10/2006)
10/10/2006	217	ORDER granting 214 Expedited Motion Extending the Time for Filing a Notice of Appeal by 30 days. The Notice of Appeal is due 11/10/06. Signed by Judge Roslyn O Silver on 10/10/06. (REW,) (Entered: 10/10/2006)
10/12/2006	219	FINDINGS OF FACT AND CONCLUSIONS OF LAW (order). Signed by Judge Roslyn O Silver on 10/11/06. (DMT,) (Entered: 10/12/2006)
10/12/2006	220	Reply *in Support of Supplemental Brief of Navajo Nation and Agnes Laughter Regarding Voting Rights Act and Civil Rights Act* by Defendants Agnes Laughter, Navajo Nation. (Attachments: # 1 Appendix Index of Exhibits# 2 Exhibit Exhibit 129# 3 Exhibit Exhibit 130# 4 Exhibit Exhibit 131# 5 Exhibit Exhibit 132# 6 Exhibit Exhibit 133# 7 Exhibit Exhibit 134# 8 Exhibit Exhibit 135# 9 Exhibit Exhibit 136# 10 Exhibit Exhibit 137# 11 Exhibit Exhibit 138# 12 Exhibit Exhibit 139# 13 Exhibit Exhibit 140# 14 Exhibit Exhibit 141# 15 Exhibit Exhibit 142# 16 Exhibit Exhibit 143) (Ferguson, Patricia) (Entered: 10/12/2006)

10/16/2006	221	ORDER of 9th Circuit, denying both motions for reconsideration. Briefing schedule established previously shall remain in effect; appeal case number 06-16702, 06-16706, as to 152 Notice of Appeal, filed by Yes on Proposition 200,, 189 Notice of Appeal – Interlocutory, filed by Hopi Tribe,, The Inter Tribal Council of Arizona, Inc.,, Steve M Gallardo,, Arizona Advocacy Network,, League of Women Voters of Arizona,, League of United Latin American Citizens Arizona,, People For the American Way Foundation,, 184 Notice of Appeal, filed by Maria M Gonzalez, (DMT,) (Entered: 10/16/2006)
10/23/2006	225	ORDER that the supplemental Preliminary Injunction Hearing for the Navajo Nation's claims is set for 11/2/2006 09:00 AM to 4:00 PM before Judge Roslyn O Silver. Parties to confer and submit a joint proposed schedule for the hearing by 10/27/06 at 12:00 PM.. Signed by Judge Roslyn O Silver on 10/23/06. (DMT,) (Entered: 10/23/2006)
10/24/2006	227	MOTION to Vacate *Hearing* by Jan Brewer. (Attachments: # 1 Exhibit) (Silverman, Peter) (Entered: 10/24/2006)
10/25/2006	228	RESPONSE *to State's Motion to Vacate November 2, 2006 Hearing*

		(Navajo Nation Plaintiffs') by Plaintiffs Agnes Laughter, Navajo Nation. (Ferguson, Patricia) (Entered: 10/25/2006)
10/25/2006	229	ORDER that the Navajo Nation Plaintiffs are to file a response by 10/26/06 at noon to re 227 MOTION to Vacate *Hearing* by Jan Brewer. (Attachments: # 1 Exhibit) (Silverman, Peter) filed by Jan Brewer, . Signed by Judge Roslyn O Silver on 10/25/06. (DMT,) (Entered: 10/25/2006)
10/26/2006	231	ORDER the State of Arizona shall file a reply to 227 MOTION to Vacate Hearing by 10/27/06. Signed by Judge Roslyn O Silver on 10/26/06. (LSP) (Entered: 10/26/2006)
10/27/2006	232	REPLY in Support re 227 MOTION to Vacate *Hearing* filed by Jan Brewer. (Silverman, Peter) (Entered: 10/27/2006)
10/27/2006	234	Emergency MOTION for PURSUANT TO FRCP 34 TO PERMIT OBSERVERS AT POLLING PLACES ON ELECTION DAY by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way

		Foundation. (Attachments: # 1 Exhibit Index# 2 Exhibit A-C# 3 Text of Proposed Order proposed Order)(Hartman, Karen) (Entered: 10/27/2006)
10/30/2006	235	RESPONSE to Motion re 234 Emergency MOTION for PURSUANT TO FRCP 34 TO PERMIT OBSERVERS AT POLLING PLACES ON ELECTION DAY filed by Kelly Dastrup, Laurette Justman. (Payette, Lance) (Entered: 10/30/2006)
10/30/2006	236	RESPONSE in Opposition re 234 Emergency MOTION for PURSUANT TO FRCP 34 TO PERMIT OBSERVERS AT POLLING PLACES ON ELECTION DAY filed by Jan Brewer. (Silverman, Peter) (Entered: 10/30/2006)
10/30/2006	237	RESPONSE in Opposition re 234 Emergency MOTION for PURSUANT TO FRCP 34 TO PERMIT OBSERVERS AT POLLING PLACES ON ELECTION DAY filed by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen

		Osborne, Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Attachments: # 1 Exhibit List# 2 Exhibit 1 Memorandum of Agreement) (Connor, M) (Entered: 10/30/2006)
10/31/2006	239	ORDER granting 227 Motion to Vacate preliminary injunction hearing of 11/2/06. The hearing set for 11/2/06 is Vacated and Reset for 2/8/07 at 9:00 am.. Signed by Judge Roslyn O Silver on 10/31/06. (DMT,) (Entered: 10/31/2006)
10/31/2006	240	REPLY in Support re 234 Emergency MOTION for PURSUANT TO FRCP 34 TO PERMIT OBSERVERS AT POLLING PLACES ON ELECTION DAY filed by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Hartman, Karen) (Entered: 10/31/2006)
11/01/2006	241	ORDER denying 234 Motion to permit observers. State of AZ and County defendants are directed to track the number of prospective voters that do not have appropriate

		identification and choose to leave the polling location rather than cast a conditional provisional ballot. Defendants must then turn over this information to the ITCA plaintiffs.. Signed by Judge Roslyn O Silver on 11/1/06. (DMT,) (Entered: 11/01/2006)
12/15/2006	249	Transmitted Record on Appeal to 9th Circuit re 152 Notice of Appeal(06-16521), 184 Notice of Appeal(06-16702). Number of Volumes of Clerks Records: 8 – COPIES ONLY; Number of Transcripts: 3; Docket Numbers of Transcripts: #90, 200, 201; Number of Expandos: One. (LSP) (Entered: 12/15/2006)
12/20/2006	250	Acknowledgment of Receipt of Record on Appeal from 9th Circuit re 152 Notice of Appeal, 184 Notice of Appeal, (SBU) (Entered: 12/20/2006)
01/30/2007	251	ORDER re preliminary injunction hearing set for 2/8/07; ORDERED that the parties are to meet and confer regarding the content and schedule of the preliminary injunction hearing; the parties should attempt to stipulate regarding admission of evidence; the parties are to submit a joint status report to the Court by 5:00 p.m., 1/31/07, setting forth the

following: (1) a proposed schedule for the preliminary injunction hearing; (2) the identity of the proposed witnesses and the content of each witness' testimony; and (3) the material facts that remain in dispute; Status Report due by 1/31/2007. Signed by Judge Roslyn O Silver on 1/30/2007. (LAD) (Entered: 01/30/2007)

02/06/2007 255 ORDER denying as moot 194 Motion to Expedite; denying as moot 203 Motion to Stay; denying as moot 211 Motion for Clarification; denying as moot 224 Motion to Reschedule Hearing. Signed by Judge Roslyn O Silver on 02/06/07. (ESL) (Entered: 02/06/2007)

02/07/2007 256 Notice re of Filing of Opening Statement by Agnes Laughter, Navajo Nation (Attachments: # 1 Appendix Plaintiffs Opening Statement)(Dworkin, Judith) (Entered: 02/07/2007)

02/07/2007 257 Notice re Notice of Filing Opening Statement by Jan Brewer, STATE OF ARIZONA (Attachments: # 1 Staet [sic] Defendants' Opening Statement) (Brennan, Carrie) (Entered: 02/07/2007)

02/07/2007 258 Notice re of Corrected Page to Opening Statement by Agnes Laughter, Navajo Nation re 256

		Other Notice (Dworkin, Judith) (Entered: 02/07/2007)
02/08/2007	259	ORDER – A Preliminary/Permanent Injunction Hearing is set for 2/8/2007 at 9:00 A.M. IT IS ORDERED this hearing will start one hour later at 10:00 A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. Signed by Judge Roslyn O Silver on 02/08/2007. (ROS,) (Entered: 02/08/2007)
02/08/2007	260	Minute Entry. Proceedings held before Judge Roslyn O Silver: Preliminary Injunction Hearing held on 2/8/2007. The Court will take the matter under advisement pending supplemental briefing. (Court Reporter Elaine Cropper.) (KFZ) (Entered: 02/12/2007)
02/12/2007	263	TRANSCRIPT of Preliminary Injunction Hearing – Day 3 – Proceedings held on 2/8/07 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. (BAS,) (Entered: 02/12/2007)
02/16/2007	274	BRIEF *Post Trial re Voting Rights Act* by Plaintiffs Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 02/16/2007)
02/16/2007	275	BRIEF *State Defendants' Post-Hearing Brief* by Defendant STATE

OF ARIZONA. (Brennan, Carrie) (Entered: 02/16/2007)

02/23/2007 276 BRIEF re 275 Brief (Non Appeal) *Responsive Post Trial re Voting Rights Act and Civil Rights Act* by Plaintiffs Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 02/23/2007)

02/23/2007 277 BRIEF *in Response to Plaintiffs' Post-Hearing Brief* by Defendant STATE OF ARIZONA filed by STATE OF ARIZONA. (Brennan, Carrie) (Entered: 02/23/2007)

05/03/2007 279 ORDER denying Navajo Nations' request for a preliminary injunction; all parties shall submit a joint statement by May 14th providing a schedule for the completion of this case. Signed by Judge Roslyn O Silver on 05/03/07. (ESL) (Entered: 05/03/2007)

05/08/2007 280 ORDER SETTING SCHEDULING CONFERENCE: Scheduling Conference is set for 8/3/2007 at 09:30 AM before Judge Roslyn O Silver. All counsel to this action must advise the Court 3 days prior to this Conference if they plan to participate by telephone; FURTHER ORDERED that counsel/parties are directed to Rule 16 of the FRCP for the guidelines to be followed at

		this Conference. Signed by Judge Roslyn O Silver on 05/08/07. (ESL) (Entered: 05/08/2007)
06/01/2007	281	MANDATE of 9th Circuit (Certified Copy), On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED. Appeal case numbers 06-16521; 06-16702; 06-16706. (ESL) (Entered: 06/01/2007)
06/04/2007	282	MOTION for Summary Judgment by Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Affidavit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Statement of Facts)(Brennan, Carrie) (Entered: 06/04/2007)
06/05/2007	283	MOTION for Summary Judgment Joinder Thereto by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John.

		(Wilenchik, Dennis) (Entered: 06/05/2007)
06/15/2007	286	ORDER re 285 Stipulation, and good cause appearing, Plas shall have until 07/12/07 to file their Response to Dfts' Motion for Summary Judgment. Dfts shall have until 08/03/07 to file their Reply to Plas' Response. Signed by Judge Roslyn O Silver on 06/15/07. (ESL) (Entered: 06/15/2007)
07/10/2007	288	MOTION for Leave to File Excess Pages for Response to Defendants' Partial Summary Judgment Motion by Maria M Gonzalez. (Attachments: # 1)(Perales, Nina) (Entered: 07/10/2007)
07/11/2007	289	Notice re Navajo County's Service of Response to ITCA Plaintiffs' Second Request for Production by Kelly Dastrup, Laurette Justman (Payette, Lance) (Entered: 07/11/2007)
07/12/2007	291	ORDER denying 288 Motion for Leave to File Excess Pages. Signed by Judge Roslyn O Silver on 07/12/07.(ESL) (Entered: 07/12/2007)
07/12/2007	292	RESPONSE to Motion re 282 MOTION for Summary Judgment filed by Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 07/12/2007)

07/12/2007	293	STATEMENT of Facts *in Response to State's Separate Statement of Facts in Support of Motion for Partial Summary Judgment* by Plaintiffs Agnes Laughter, Navajo Nation. (Attachments: #1 Exhibit Tab 1, Part 1# 2 Exhibit Tab 1 Part 2# 3 Exhibit Tab 2# 4 Exhibit Tab 3# 5 Exhibit Tab 4# 6 Exhibit Tab 5# 7 Exhibit Tab 6# 8 Exhibit Tab 7# 9 Exhibit Tab 8# 10 Exhibit Tab 9# 11 Exhibit Tab 10# 12 Exhibit Tab 11# 13 Exhibit Tab 12# 14 Exhibit Tab 13) (Dworkin, Judith) (Entered: 07/12/2007)
07/12/2007	294	DECLARATION of Patricia Ferguson-Bohnee Pursuant to Rule 56(f) by Plaintiffs Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 07/12/2007)
07/12/2007	295	RESPONSE in Opposition re 282 MOTION for Summary Judgment, 283 MOTION for Summary Judgment *Joinder Thereto* filed by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Hartman, Karen) (Entered: 07/12/2007)

07/12/2007	296	RESPONSE in Opposition re 282 MOTION for Summary Judgment, 283 MOTION for Summary Judgment *Joinder Thereto Response in Opposition to Statement of Facts and Supplemental Statement of Facts* filed by The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Attachments: # 1 Affidavit Declaration of Karen J. Hartman-Tellez with Exhibits A-O# 2 Exhibit Exhibits P-S to Hartman-Tellez Declaration) (Hartman, Karen) (Entered: 07/12/2007)
07/12/2007	297	RESPONSE to Motion re 282 MOTION for Summary Judgment, 283 MOTION for Summary Judgment *Joinder Thereto* filed by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Chicanos Por La Causa. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6) (Perales, Nina) (Entered: 07/12/2007)

07/12/2007	298	STATEMENT of Response to Separate Statement of Facts in Support of Motion for Partial Summary Judgment by Defendants re 282 MOTION for Summary Judgment by Plaintiffs Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Chicanos Por La Causa. (Perales, Nina) (Entered: 07/12/2007)
08/01/2007	303	First MOTION for Leave to File Excess Pages for for [sic] Summary Judgment by Jan Brewer, STATE OF ARIZONA. (Attachments: # 1 Text of Proposed Order Order [sic]) (Brennan, Carrie) (Entered: 08/01/2007)
08/01/2007	305	ORDER granting Defendants' 303 Motion to Exceed Page limitation. Defendants' Reply in Support of their Motion for Summary Judgment shall not exceed thirteen pages. Signed by Judge Roslyn O Silver on 08/01/07. (ESL) (Entered: 08/01/2007)
08/03/2007	306	REPLY in Support re 282 MOTION for Summary Judgment filed by Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit TABS A-C) (Bailey, Barbara)

		Modified on 8/9/2007 (LAD). DOCUMENT FILED WITH INCORRECT JUDGE INITIALS IN CASE NUMBER AS TO MEMBER CASES. (Entered: 08/03/2007)
08/03/2007	307	STATEMENT of SUPPLEMENTAL SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT BY DEFENDANTS STATE OF ARIZONA AND THE ARIZONA SECRETARY OF STATE re 282 MOTION for Summary Judgment, 306 Reply in Support of Motion by Defendants Jan Brewer, State of Arizona. (Bailey, Barbara) Modified on 8/10/2007 (LAD). DOCUMENT FILED WITH INCORRECT JUDGE INITIALS IN CASE NUMBER AS TO MEMBER CASES. (Entered: 08/03/2007)
08/03/2007	308	DECLARATION of SECOND DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT BY DEFENDANTS STATE OF ARIZONA AND THE ARIZONA SECRETARY OF STATE re 282 MOTION for Summary Judgment, 307 Statement, 306 Reply in Support of Motion

		by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit TAB 9) (Bailey, Barbara) Modified on 8/10/2007 (LAD). DOCUMENT FILED WITH INCORRECT JUDGE INITIALS IN CASE NUMBER AS TO MEMBER CASES. (Entered: 08/03/2007)
08/08/2007	309	Notice re Service of Plaintiffs Navajo Nation and Agnes Laughter's Rule 26(a) Initial Disclosure Statement by Agnes Laughter, Navajo Nation (Dworkin, Judith) (Entered: 08/08/2007)
08/10/2007	315	MOTION to Expedite Consideration by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Perales, Nina) (Entered: 08/10/2007)
08/13/2007	317	Joinder re 315 MOTION to Expedite Consideration *ITCA Plaintiffs' Joinder In Gonzalez Plaintiffs' Motion for Expedited Consideration* by Plaintiff The Inter Tribal Council of Arizona, Inc. filed by The Inter Tribal Council of Arizona, Inc.. (Greene, Sara) (Entered: 08/13/2007)

08/15/2007	319	STATEMENT of 13 County Defendants Regarding Discovery Dispute *with Statements from Gonzalez Plaintiffs, ITCA Plaintiffs and Rule 7.2(j) Certifications* by Plaintiffs Friendly House, The Inter Tribal Council of Arizona, Inc., Jesus Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Defendants Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn Constabile, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling,

		State of Arizona, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Amicus Parties Amicus Curiae, Protect Arizona Now, Washington Legal Foundation. (Attachments: # 1 # 2 # 3 13 County Defendants Rule 7.2(j) Certification# 4 Gonzalez Plaintiffs Rule 7.2(j) Certification# 5 ITCA Plaintiffs' Rule 7.2(j) Certification) (Wilenchik, Dennis) (Entered: 08/15/2007)
08/16/2007	320	RESPONSE to Motion re 315 MOTION to Expedite Consideration *by Thirteen County Defendants* filed by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Attachments: # 1) (Connor, M) (Entered: 08/16/2007)
08/16/2007	321	ORDER – A Scheduling Conference is set for 8/16/2007 at 1:30 P.M. IT IS ORDERED this

		hearing is VACATED and RESET to 8/17/2007 at 2:00 P.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. Signed by Judge Roslyn O Silver on 08/16/2007. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 08/16/2007)
08/16/2007	322	ORDER – A Scheduling Conference is set for 8/17/2007 at 2:00 P.M. An Order is forthcoming from this Court that will streamline remaining issues. This hearing is HEREBY VACATED to be RESET at a later time. Signed by Judge Roslyn O Silver on 08/16/2007. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 08/16/2007)
08/17/2007	323	MOTION to Amend/Correct re Complaint by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Exhibit A (Comparison of Complaint with Proposed Amended Complaint)# 2 Exhibit B

		(Proposed First Amended Complaint)# 3 Text of Proposed Order) (Perales, Nina) (Entered: 08/17/2007)
08/17/2007	324	LODGED Proposed First Amended Complaint for Declaratory and Injunctive Relief re: 323 MOTION to Amend/Correct re Complaint. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Perales, Nina) (Entered: 08/17/2007)
08/17/2007	325	MEMORANDUM re: Memorandum of Law in Support of Motion for Leave to File First Amended Complaint by Plaintiffs Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Perales, Nina) (Entered: 08/17/2007)
08/28/2007	330	ORDER granting Dft's 282 Motion for Summary Judgment. Granting

283 Motion for Summary Judgment Joinder. Granting 326 Motion to Withdraw as Attorney. The parties shall submit a revised case managment [sic] plan and proposed scheduling order by 09/14/07. A hearing on the parties' discovery dispute is set for 08/30/07 at 1:30pm. A rule 16 Scheduling Conference is set for 09/28/07 at 10:30am. Signed by Judge Roslyn O Silver on 08/28/07. (ESL) (Entered: 08/28/2007)

08/29/2007	331	MOTION for Protective Order by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Exhibit 1-3) (Perales, Nina) (Entered: 08/29/2007)
08/29/2007	332	LODGED Proposed Proposed [sic] Protective Order re: 331 MOTION for Protective Order. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie

		Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (Attachments: # 1 Exhibit Stipulation of Confidentiality) (Perales, Nina) (Entered: 08/29/2007)
08/30/2007	333	Minute Entry. Proceedings held before Judge Roslyn O Silver: Discovery dispute hearing held on 8/30/2007. (Court Reporter Elaine Cropper.) (KFZ) (Entered: 08/30/2007)
09/06/2007	339	TRANSCRIPT of Discovery Dispute Proceedings held on 8/30/07 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. (BAS,) (Entered: 09/11/2007)
09/11/2007	340	MOTION for Ruling *For Approval of Proposed Preliminary Script Outline* by The Inter Tribal Council of Arizona, Inc.. (Attachments: # 1 Exhibit A# 2 Text of Proposed Order) (Greene, Sara) (Entered: 09/11/2007)
09/11/2007	341	MOTION to Appoint Expert/ *State and Thirteen County Defendants' Motion for Appointment of Indpendent* [sic] *Expert and Approval of Final Script* by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Susan Hightower

Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Attachments: # 1 Exhibit A-B) (Wilenchik, Dennis) (Entered: 09/11/2007)

09/11/2007 342 Proposed Order re: 341 MOTION to Appoint Expert/*State and Thirteen County Defendants' Motion for Appointment of Indpendent* [sic] *Expert and Approval of Final Script.* Filed by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn Constabile, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) Modified on 9/12/2007 INCORRECT EVENT SELECTED. DOCKET TEXT MODIFIED TO

REFLECT PROPOSED ORDER NOT A PROPOSED DOCUMENT (ESL). (Entered: 09/11/2007)

09/14/2007 343 AMENDED DOCUMENT by Friendly House, The Inter Tribal Council of Arizona, Inc., Jesus Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn Constabile, Kelly Dastrup, Maria M Gonzalez, Yes on Proposition 200, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Penny Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Agnes Laughter, Navajo Nation, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Bernie Abeytia,

		Arizona Hispanic Community Forum, Chicanos Por La Causa. *Revised Proposed Case Management Plan.* (Attachments: # 1 Text of Proposed Order Proposed Scheduling Order) (Hartman, Karen) (Entered: 09/14/2007)
09/17/2007	344	Appeal Record Returned: 152 Notice of Appeal, 184 Notice of Appeal, Number of Volumes of Clerks Records: 8 – COPIES ONLY, Number of Transcripts: 3, Docket numbers of Transcripts:# 90, 200, 201, Number of Expandos: 1 (ESL) (Entered: 09/18/2007)
09/20/2007	345	ORDER denying Pla Gonzalez' 315 Motion to Expedite Consideration. Signed by Judge Roslyn O Silver on 9/20/07.(KMG) (Entered: 09/20/2007)
09/20/2007	346	ORDER denying Pla Gonzalez' 331 Motion for Entry of Protective Order and Agreed Stipulation as moot. Signed by Judge Roslyn O Silver on 9/20/07.(KMG) (Entered: 09/20/2007)
09/25/2007	349	RESPONSE in Opposition re 341 MOTION to Appoint Expert/*State and Thirteen County Defendants' Motion for Appointment of Indpendent* [sic] *Expert and Approval of Final Script* filed by

		The Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation. (Attachments: # 1 Affidavit Declaration of Bruce Hernandez) (Hartman, Karen) (Entered: 09/25/2007)
09/28/2007	360	Minute Entry. Proceedings held before Judge Roslyn O Silver : Scheduling Conference held on 9/28/2007. Orders to follow. (Court Reporter Elaine Cropper.)(CLB) (Entered: 10/04/2007)
10/01/2007	351	ORDER granting 323 Motion for Leave to file First Amended Complaint. The Clerk of the Court shall file Gonzalez Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief. Signed by Judge Roslyn O Silver on 09/30/07.(ESL) (Entered: 10/01/2007)
10/01/2007	352	FIRST AMENDED COMPLAINT against all defendants, filed by Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Friendly House, Jesus Gonzalez, Debbie Lopez,

		Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa. (ESL,) (Entered: 10/01/2007)
10/01/2007	353	ORDER denying as moot Gonzalez and ITCA Pla's 340 Motion for Approval of Proposed Preliminary Script Outline; and State and Thirteen Dfts' 341 Motion For Appointment of Independent Expert and Approval of Final Script. Signed by Judge Roslyn O Silver on 09/30/07.(ESL) (Entered: 10/01/2007
10/05/2007	361	Notice of Filing Proposed Pretrial Order filed by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, The Inter Tribal Council of Arizona, Inc., Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol,

		Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn A Constabile, Kelly Dastrup, Maria M Gonzalez, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Agnes Laughter, Navajo Nation, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc. (Hartman, Karen) (Entered: 10/05/2007)
10/16/2007	401	MOTION to Dismiss Counts/ Claims: 1st, 3rd, 6th, 8th, 9th, 10th, 11th by Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit) (Bailey, Barbara) (Entered: 10/16/2007)
10/22/2007	402	SCHEDULING ORDER: Discovery due by 2/29/2008, Dispositive motions due by 3/14/2008, Proposed Pretrial Order due by 5/16/2008. An Interim Rule 16

		Status Hearing set for 2/29/2008 at 08:30 AM before Judge Roslyn O Silver. Seven days prior to the Interim Hearing counsel are to prepare and file a Joint Status Report. Signed by Judge Roslyn O Silver on 10/22/07. (ESL) (Entered: 10/22/2007)
10/25/2007	406	STIPULATION *of Confidentiality* by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, The Inter Tribal Council of Arizona, Inc., Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn A Constabile, Kelly Dastrup, Maria M Gonzalez, Yes on Proposition 200, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill,

		Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Agnes Laughter, Navajo Nation, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Amicus Curiae, Bernie Abeytia, Protect Arizona Now, Washington Legal Foundation, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit 1 – Agreement to Abide by Stipulation and Protective Order) (Perales, Nina) (Entered: 10/25/2007)
10/29/2007	412	TRANSCRIPT of Scheduling. Conference Proceedings held on 9/28/07 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. (BAS,) (Entered: 10/30/2007)
10/30/2007	408	ORDER after review of the Stipulation and Agreement to abide by Stipulation and Protective Order, the Stipulation and Agreement are accepted by the Court. Signed by Judge Roslyn O Silver on 10/30/07. (ESL) (Entered: 10/30/2007)
10/30/2007	413	RESPONSE in Opposition re 401 MOTION to Dismiss Counts/ Claims: 1st, 3rd, 6th, 8th, 9th,

		10th, 11th filed by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Perales, Nina) (Entered: 10/30/2007)
11/09/2007	431	REPLY in Support re 401 MOTION to Dismiss Counts/Claims: 1st, 3rd, 6th, 8th, 9th, 10th, 11th *Causes of Action of the Gonzalez Plaintiffs First Amended Complaint* filed by Jan Brewer, State of Arizona. (Brennan, Carrie) (Entered: 11/09/2007)
11/16/2007	433	MOTION to Dismiss Party Agnes Laughter by Jan Brewer, State of Arizona. (Brennan, Carrie) (Entered: 11/16/2007)
11/16/2007	434	MOTION to Dismiss Party Gonzalez Plaintiffs by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 11/16/2007)
11/16/2007	435	DECLARATION of Declaration of Counsel in Support of Motions to Dismiss re 434 MOTION to

		Dismiss Party Gonzalez Plaintiffs, 433 MOTION to Dismiss Party Agnes Laughter by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit Exhibits 1-13) (Bailey, Barbara) (Entered: 11/16/2007)
11/19/2007	436	Notice re FILING OF EXHIBITS by Jan Brewer, State of Arizona re 435 Declaration, (Attachments: # 1 Exhibit 1-13 IN SUPPORT OF DEFENDANTS MOTIONS TO DISMISS PURSUANT TO FED.R.CIV.P. 12(B)(1)) (Bailey, Barbara) (Entered: 11/19/2007)
11/29/2007	449	ORDER – A Status Conference is set for 2/29/2008 at 8:30 A.M. IT IS ORDERED this hearing iS VACATED AND RESET to 2/29/2008 at 9:00 A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. THIS IS A TIME CHANGE ONLY!! A Joint Status report is due to be filed one week in advance of the hearing. Signed by Judge Roslyn O Silver on 11/29/2007. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 11/29/2007)
12/05/2007	461	Joint MOTION to Amend/Correct re Scheduling Order *by Consolidated Plaintiffs* by Friendly

House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Inter Tribal Council of Arizona, Inc, Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Agnes Laughter, Navajo Nation, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Perales, Nina) (Entered: 12/05/2007)

12/05/2007 462 Notice re Proposed Proposed [sic] Amended Scheduling Order re: 461 Joint MOTION to Amend/ Correct re Scheduling Order *by Consolidated Plaintiffs*. Filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Inter Tribal Council of Arizona, Inc, Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American

		Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Agnes Laughter, Navajo Nation, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Perales, Nina) Modified on 12/6/2007 INCORRECT EVENT SELECTED, DOCKET MODIFIED FROM LODGED PROPOSED DOCUMENT TO OTHER NOTICE.(ESL). (Entered: 12/05/2007)
12/07/2007	467	RESPONSE to Motion re 461 Joint MOTION to Amend/Correct re Scheduling Order *by Consolidated Plaintiffs and Cross-Motion* filed by Jan Brewer, State of Arizona. (Attachments: # 1 Text of Proposed Order Proposed Order, # 2 Text of Proposed Order Proposed Amended Scheduling Order) (Bailey, Barbara) (Entered: 12/07/2007)
12/07/2007	468	DECLARATION of Barbara Bailey In Support of State and Thirteen County Defendants Motion to Modify the Case Schedule and Cross-Motion for the Modification of the Schedule re 467 Response to Motion, by Defendants Jan Brewer, State of

		Arizona. (Attachments: # 1 Exhibit Tabs 1-3) (Bailey, Barbara) (Entered: 12/07/2007)
12/07/2007	469	DECLARATION of Colleen Connor re 467 Response to Motion, by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit A-D) (Bailey, Barbara) (Entered: 12/07/2007)
12/17/2007	484	AMENDED SCHEDULING ORDER: An Interim Rule 16 Status Hearing is scheduled for 2/29/2008 at 09:00 AM before Judge Roslyn O Silver. Discovery due by 3/28/2008. Dispositive motions due by 4/4/2008. Joint Proposed Pretrial Order due by 5/30/2008. Signed by Judge Roslyn O Silver on 12/17/07. (ESL,) (Entered: 12/17/2007)
12/19/2007	487	RESPONSE to Motion re 434 MOTION to Dismiss Party Gonzalez Plaintiffs filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit

		Declaration of Nina Perales) (Perales, Nina) Modified on 12/20/2007 DOCUMENT NOT IN COMPLIANCE WITH LRCiv 7.1(c). ATTORNEY NOTICED (ESL). (Entered: 12/19/2007)
12/19/2007	488	RESPONSE *to Motion to Dismiss* by Plaintiffs Agnes Laughter, Navajo Nation. (Attachments: # 1 Exhibit) (Ramos, Javier) (Entered: 12/19/2007)
01/07/2008	538	STATEMENT of Joint Statement of Discovery Dispute by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Association of Community Organizations for reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Perales, Nina) (Entered: 01/07/2008)
01/07/2008	539	REPLY in Support re 434 MOTION to Dismiss Party Gonzalez Plaintiffs filed by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 01/07/2008)
01/07/2008	540	DECLARATION of Second Declaration of Counsel re 539 Reply in Support of Motion by Defendants Jan Brewer, State of Arizona.

		(Attachments: # 1 Exhibit Tabs 14-18) (Bailey, Barbara) (Entered: 01/07/2008)
01/07/2008	541	DECLARATION of Declaration of Karen Osborne re 539 Reply in Support of Motion by Defendants Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 01/07/2008)
01/07/2008	542	REPLY in Support re 433 MOTION to Dismiss Party Agnes Laughter filed by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 01/07/2008)
01/08/2008	543	ORDER: After review of the parties' submissions, the Court will allow Gonzalez plas to conduct the requested depositions. Signed by Judge Roslyn O Silver on 1/8/2008. (LAD) (Entered: 01/08/2008)
01/17/2008	549	Notice re Notice of Discovery Dispute by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por

		La Causa, Inc. (Perales, Nina) (Entered: 01/17/2008)
01/22/2008	554	ORDER re Discovery issue in dispute. First, no conflict exists between Gonzalez Pla' [sic] request and Article VII, § 1 of the Arizona Constitution. Second, if, as County Defendants submit, they do not have custody or control of the uncounted provisional ballot envelopes, Gonzalez Pla may subpoena, as allowed by the rules, the appropriate entity. Signed by Judge Roslyn O Silver on 01/22/08. (ESL) (Entered: 01/22/2008)
01/24/2008	593	ORDER – A Status Conference is set for 2/29/2008 at 9:00 A.M. IT IS ORDERED this hearing is VACATED AND RESET to 3/21/2008 at 11:00 A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. A Joint Status Report is due to be filed one week in advance of the hearing. Signed by Judge Roslyn O Silver on 01/24/2008. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 01/24/2008)
02/05/2008	600	Notice re Joint Discovery Dispute Statement by John McCall, Steve

		Kizer, Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn A Constabile, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haight Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John (Attachments: # 1 Exhibit Certificate, # 2 Exhibit Order) (Wilenchik, Dennis) (Entered: 02/05/2008)
02/05/2008	611	ORDER granting Dfts' 401 Motion to Dismiss Counts/Claims: First, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Causes. Gonzalez Plas' Sixth and Eleventh Causes of Action are dismissed WITHOUT prejudice and Gonzalez Plas' First, Third, Eighth, Ninth, Tenth Causes of Action are dismissed WITH prejudice. Signed by Judge Roslyn O Silver on 02/05/08. (ESL) (Entered: 02/05/2008)

02/06/2008	614	MOTION to Quash Subpoena by Beth Ford. (Attachments: # 1 Text of Proposed Order Proposed Order [sic]) (Jurkowitz, Daniel) (Entered: 02/06/2008)
02/07/2008	615	RESPONSE re 601 Objection *to Subpoenas* by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Perales, Nina) (Entered: 02/07/2008)
02/07/2008	616	First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs* by Jan Brewer, State of Arizona. (Attachments: # 1 Text of Proposed Order Proposed Order [sic]) (Bailey, Barbara) (Entered: 02/07/2008)
02/07/2008	617	DECLARATION of Counsel (Third) re 616 First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ.*

*P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs*First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs'* by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit Tabs 19-21) (Bailey, Barbara) (Entered: 02/07/2008)

02/08/2008 619 OBJECTION *of Pinal County Treasurer to Subpoena Requiring Production of Materials* by Objector Dolores J Doolittle. (Roll, Chris) (Entered: 02/08/2008)

02/08/2008 620 OBJECTION *of Maricopa County Treasurer to Plaintiffs' Subpoena* filed by Charles Hoskins. (White, Bruce) (Entered: 02/08/2008)

02/08/2008 624 RESPONSE in Opposition re 614 MOTION to Quash Subpoena filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1

Exhibit 1) (Perales, Nina) (Entered: 02/08/2008)

02/11/2008 631 MOTION to Quash SUBPOENA by Melinda Meek, Suzie Sainz. (Parra, Luis) DOCUMENT NOT INCOMPLIANCE [sic] WITH LRCiv 7.1(c) ATTORNEY NOTICED, NO FOLLOW UP REQUIRED. Modified on 2/12/2008 (ESL,). (Entered: 02/11/2008)

02/12/2008 634 OBJECTION to Plaintiffs' 610 Subpoena. (ESL) (Entered: 02/13/2008)

02/13/2008 637 MOTION to Quash Subpoena requiring Production of Materials by Jean Reynolds. (Angle, Kenneth) (Entered: 02/13/2008)

02/14/2008 644 MOTION to Quash Subpoena in a civil case by Patricia Hernandez. (McCarthy, Michael) (Entered: 02/14/2008)

02/14/2008 646 OBJECTION /*La Paz County Treasurer's Objection to Plaintiffs' Subpoena.* (Wilenchik, Dennis) (Entered: 02/14/2008)

02/19/2008 655 RESPONSE re 646 Objection, 644 MOTION to Quash Subpoena in a civil case, 634 Objection, 631 MOTION to Quash SUBPOENA, 637 MOTION to Quash Subpoena Requiring Production of Materials by Plaintiffs Friendly House, Georgia Morrison Flores, Common

		Cause, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit A) (Perales, Nina) (Entered: 02/19/2008)
02/21/2008	661	ORDER The county treasurers shall produce the requested copies of the outside of envelopes containing conditional provisional ballots that were never counted within two weeks of the date of this Order. The discovery deadlines is extended by two weeks from the date of this Order for the limited purpose of allowing production of the subpoenaed documents. Documents 614, 631, 637, and 644 are DENIED. Signed by Judge Roslyn O Silver on 02/21/08. (ESL) (Entered: 02/21/2008)
02/26/2008	679	RESPONSE to Motion re 616 First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P.12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs*First MOTION

to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiff's* filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Declaration of Diego Bernal) (Perales, Nina) (Entered: 02/26/2008)

03/06/2008 695 REPLY in Support re 616 First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs*First MOTION to Supplement *the Record In Support of State Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(1) (Lack of Standing) Directed to Gonzalez Plaintiffs* filed by Jan Brewer,

State of Arizona. (Bailey, Barbara) (Entered: 03/06/2008)

03/06/2008	696	AFFIDAVIT of Barbara A. Bailey re 695 Reply in Support of Motion, by Defendants Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 03/06/2008)
03/14/2008	716	STATUS REPORT *by Consolidated Plaintiffs* by Inter Tribal Council of Arizona, Inc, Maria M Gonzalez, Agnes Laughter, Navajo Nation. (Perales, Nina) (Entered: 03/14/2008)
03/17/2008	717	STATUS REPORT *Coconino County Defendants' Status Report* by Candace Owens, Patty Hansen. (Wilcox, Jean) (Entered: 03/17/2008)
03/17/2008	718	STATUS REPORT *Defendants' Joint Status Report* by Jan Brewer, State of Arizona. (O'Grady, Mary) (Entered: 03/17/2008)
03/19/2008	720	Notice re Filing Agreements to Abide by Stipulation and Protective Order by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic

		Community Forum, Chicanos Por La Causa, Inc. (Attachments: # 1 Exhibit Agreements to Abide by Stipulation and Protective Order)(Perales, Nina) (Entered: 03/19/2008)
03/20/2008	721	AMENDED SCHEDULING ORDER Discovery due by 4/4/2008; Dispositive Motions due 04/04/08; Joint Proposed Pretrial Order due 05/30/08. An Interim Rule 16 Status Hearing is scheduled for 03/21/08 at 11:00am. Signed by Judge Roslyn O Silver on 03/20/08. (Note: see attached pdf for full details)(ESL) (Entered: 03/20/2008)
03/20/2008	722	MOTION for Leave to File to File [sic] Surreply *to Defs.' Motion to Supp. the Record* by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 03/20/2008)
03/20/2008	723	LODGED Proposed Surreply to Defs. Motion to Supp. the Record re: 722 MOTION for Leave to File

to File [sic] Surreply *to Defs.' Motion to Supp. the Record.* Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 03/20/2008)

03/20/2008 724 ADDITIONAL ATTACHMENTS TO MAIN DOCUMENT Proposed Proposed Order re: 722 MOTION for Leave to File to File Surreply *to Defs.' Motion to Supp. the Record.* Filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc. (Bernal, Diego) INCORRECT EVENT SELECTED, DOCKET MODIFIED FROM LODGED PROPOSED DOCUMENT TO ADDITIONAL

		ATTACHMENTS TO MAIN DOUCMENT [sic] Modified on 3/21/2008 (ESL). (Entered: 03/20/2008)
03/21/2008	725	Minute Entry. Proceedings held before Judge Roslyn O Silver: Status Hearing held on 3/21/2008. Granting Dfts' 616 Motion to Supplement and Pla's 722 Motion to File a surreply. Order to Issue; taking all remaining motions under advisement. Counsel to submit a final amended Rule 16 Scheduling Order in accordance with the dates established at this hearing by 03/28/08. (Court Reporter Elaine Cropper.) (ESL) (Entered: 03/21/2008)
03/24/2008	726	ORDER granting the State's 616 Motion to Supplement the Record; granting Pla's 722 Motion for Leave to File a Sur-reply. Signed by Judge Roslyn O Silver on 03/24/08.(ESL) (Entered: 03/24/2008)
03/24/2008	727	Sur-Reply re 616 Motion to Supplement the Record, filed by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez,

		Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Note: Filed per order 726) (ESL) (Entered: 03/24/2008)
03/25/2008	735	TRANSCRIPT of Proceedings re: Status Conference held on 3/21/08 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/15/2008. Redacted Transcript Deadline set for 4/25/2008. Release of Transcript Restriction set for 6/23/2008. (BAS,) (Entered: 03/25/2008)
03/27/2008	739	ORDER – A Status Conference is set for 3/28/2008 at 10:00 A.M. IT IS ORDERED this hearing is VACATED AND RESET to 8/29/2008 at 9:30 A.M. in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003 before Judge Roslyn O Silver. A Joint Status Report is due to be filed one week in advance of the hearing. Signed by Judge Roslyn O Silver on 03/27/2008. This is a TEXT ENTRY ONLY. There is no PDF document associated with

		this entry. (ROS,) (Entered: 03/27/2008)
03/27/2008	740	FINAL AMENDED SCHEDULING ORDER: Discovery due by 6/4/2008. Dispositive motions due by 6/6/2008. Joint Proposed Pretrial Order due by 7/15/2008. Trial to begin on 07/29/08 Signed by Judge Roslyn O Silver on 3/27/08. (Note: see attached pdf for full details.(ESL,) (Entered: 03/27/2008)
04/01/2008	741	STIPULATION of Dismissal *Joint Stipulation to Dismiss Claims of People for the American Way Foundation* by People For the American Way Foundation. (Attachments: # 1 Text of Proposed Order)(Greene, Sara) (Entered: 04/01/2008)
04/01/2008	742	ORDER – A Status Hearing is set for 08/29/2008 at 9:30 A.M. It is ordered this hearing is VACATED. Signed by Judge Roslyn O Silver on 04/01/2008. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (ROS,) (Entered: 04/01/2008)
04/01/2008	743	ORDER that PFAWF's claims in Case No. CV06-1575-PHX-ROS are dismissed without prejudice. Signed by Judge Roslyn O Silver on 04/01/08. (ESL) Modified on 4/9/2008 (LJS). Modified text to

reflect case was dismissed without prejudice not with prejudice. (Entered: 04/01/2008)

04/15/2008 748 Notice re Amended Notice of Third Party Deposition of USCIS Pursuant to FRCP 30(b)(6) by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc. (Perales, Nina) (Entered: 04/15/2008)

04/18/2008 749 STIPULATION of Dismissal *Joint Stipulation to Dismiss Pending Approval of Changes to Procedures* by Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 04/18/2008)

04/21/2008 750 ORDER that State Dfts' 433 Motion to Dismiss Pursuant to. Fed.R.Civ.P. 12(b)(1) directed to Agnes Laughter is denied without prejudice. Signed by Judge Roslyn O Silver on 04/18/08.(ESL,) (Entered: 04/21/2008)

05/06/2008 755 ORDER Parties are to submit briefs by 5/13/08. Signed by Judge

Roslyn O Silver on 5/6/08. (LSP) (Entered: 05/06/2008)

05/13/2008 761 BRIEF re 755 Order *Impact of Crawford v. Marion Decision* by Plaintiffs Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 05/13/2008)

05/13/2008 762 BRIEF re 755 Order *Brief by Defendants State of Arizona and Arizona Secretary of State Re: The Impact of Crawford v. Marion County Election Board* by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit)(Bailey, Barbara) (Entered: 05/13/2008)

05/13/2008 763 BRIEF re 755 Order *ITCA Plaintiffs' Brief Regarding Crawford v. Marion County Election Board* by Plaintiffs Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona filed by Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Greene, Sara) (Entered: 05/13/2008)

05/13/2008 764 Joinder re 762 Brief (Non Appeal) *On Impact of Crawford* by

		Defendants Shelly Baker, Berta Manuz, Christine Rhodes, Lynn A Constabile, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) (Entered: 05/13/2008)
05/13/2008	765	BRIEF re 755 Order *to Submit Briefs on the Impact of Crawford* by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Perales, Nina) (Entered: 05/13/2008)
05/14/2008	766	Joinder re 761 Brief (Non Appeal), 763 Brief (Non Appeal), Brief (Non Appeal), Brief (Non Appeal) *Defendant Coconino County's Joinder*

		in ITCA and Navajo Nations' Briefs on Crawford v. Marion County Election Board by Defendants Candace Owens, Patty Hansen. (Wilcox, Jean) (Entered: 05/14/2008)
05/14/2008	767	Joinder *in State Defendants' Brief Re: The Impact of Crawford v. Marion County Election Board* by Defendants Laura Dean-Lytle, Gilberto Hoyos. (Roll, Chris) (Entered: 05/14/2008)
05/19/2008	768	ORDER: Bench Trial set for 7/1/2008 08:30 AM before Judge Roslyn O Silver. Dispositive motions due by 6/6/2008. Proposed Pretrial Order due by 6/16/2008. Final Pretrial Conference set for 6/30/2008 02:30 PM before Judge Roslyn O Silver. All previous hearing and trial dates are vacated. See Order for further deadlines. Signed by Judge Roslyn O Silver on 05/19/08. (DNH) (Entered: 05/19/2008)
05/19/2008	769	STIPULATION *Agreement to Extend the Timeframe of the Parties' Joint Stipulation to Dismiss* by Agnes Laughter, Navajo Nation. (Dworkin, Judith) (Entered: 05/19/2008)
05/27/2008	775	ORDER granting 749 STIPULATION of Dismissal – Joint Stipulation to Dismiss Pending Approval of Changes to Procedures by. Case

		No. CV-06-1575-PHX-ROS is dismissed without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. So long as the Revised Procedures remain in force and are effectively implemented, no action that challenges Proposition 200, A.R.S. § 16-579, or the Revised Procedures on their face or as applied may be brought by Plaintiffs or any of them against Defendants or any of them and any such action shall be subject to dismissal. The parties agree that each party shall bear its own attorney fees and costs incurred in this action. Signed by Judge Roslyn O Silver on 05/27/08. (DNH) (Entered: 05/27/2008)
05/27/2008	776	ORDER granting 754 Joint Stipulation to Dismiss Pending Approval of Changes to Polling Place Procedures. ITCA and Hopi Plaintiffs are dismissed without prejudice as to the Procedures and the polling place identification requirementsof [sic] A.R.S. § 16-579 only. This Order does not dismiss any claims or allegations set forth in the Complaint challenging the proof of citizenship requirements for voter registration. As long as the Revised Procedures remain in force and are

effectively implemented at the polls, the ITCA and Hopi Plaintiffs shall not re-file any claims dismissed by this Order or file any other action or complaint against the State Defendants that challenges the Revised Procedures or the polling place identification requirements of A.R.S. § 16-579, on their face or as applied. Signed by Judge Roslyn O Silver on 05/27/08. (DNH) (Entered: 05/27/2008)

06/06/2008 790 MOTION for Summary Judgment *Directed to ITCA Plaintiffs* by Jan Brewer. (Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 791 STATEMENT of Separate Statement of Facts re 790 MOTION for Summary Judgment *Directed to ITCA Plaintiffs* by Defendant Jan Brewer. (Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 792 DECLARATION of Declaration of Counsel re 791 Statement, 790 MOTION for Summary Judgment *Directed to ITCA Plaintiffs* by Defendant Jan Brewer. (Attachments: # 1 Exhibit Tabs 1-6)(Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 793 First MOTION for Summary Judgment *resubmiited w/proposed order* by Jan Brewer.

(Attachments: # 1 Text of Proposed Order)(Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 799 MOTION for Summary Judgment *Directed to Gonzalez Plaintiffs* by Jan Brewer, State of Arizona. (Attachments: # 1 Text of Proposed Order) (Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 800 STATEMENT of Separate Statement of Facts re 799 MOTION for Summary Judgment *Directed to Gonzalez Plaintiffs* by Defendants Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 801 DECLARATION of Declaration of Counsel by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit, # 2 Exhibit)(Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 802 DECLARATION of Declaration of Dr. Jeffrey Zax by Defendants Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit)(Bailey, Barbara) (Entered: 06/06/2008)

06/06/2008 803 First MOTION for Summary Judgment *and Memorandum* by Karen Osborne, Helen Purcell. (Connor, M) (Entered: 06/06/2008)

06/06/2008 804 STATEMENT of Facts in Support of Motion for Summary Judgment

by Defendants Karen Osborne, Helen Purcell. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Connor, M) (Entered: 06/06/2008)

06/13/2008 808 First MOTION for to File Non-Electronic Exhibits *in Support of Consolidated Response to Motions for Summary Judgment and Additional Facts* by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/13/2008)

06/13/2008 809 RESPONSE re 791 Statement *ITCA PLAINTIFFS' RESPONSE TO SEPARATE STATEMENT OF FACTS BY DEFENDANT ARIZONA SECRETARY OF STATE AND SUPPLEMENTAL STATEMENT OF FACTS* by Plaintiffs Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona,

		League of Women Voters of Arizona. (Greene, Sara) (Entered: 06/13/2008)
06/13/2008	810	DECLARATION re 809 Response, *DECLARATION OF KAREN J. HARTMAN-TELLEZ* by Plaintiffs Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Attachments: # 1 Exhibit 1 through 20 PART 1, # 2 Exhibit 1 through 20 PART 2, # 3 Exhibit 21 through 40 PART 1, # 4 Exhibit Exhibits 21 through 40 PART 2)(Greene, Sara) (Entered: 06/13/2008)
06/13/2008	811	Additional Attachments to Main Document re 810 Declaration, *Exhibits 41 through 53 PART 1* by Plaintiffs Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Attachments: # 1 Exhibit 41 through 53 PART 2, # 2 Exhibit 54 through 58, # 3 Exhibit 59 through 66, # 4 Exhibit 67 through 69)(Greene, Sara) (Entered: 06/13/2008)

06/13/2008	812	RESPONSE in Opposition re 790 MOTION for Summary Judgment *Directed to ITCA Plaintiffs RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT DIRECTED TO THE ITCA PLAINTIFFS BY DEFENDANT ARIZONA SECRETARY OF STATE* filed by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Greene, Sara) (Entered: 06/13/2008)
06/14/2008	813	RESPONSE in Opposition re 799 MOTION for Summary Judgment *Directed to Gonzalez Plaintiffs,* 803 First MOTION for Summary Judgment *and Memorandum Consolidated Response* filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/14/2008)

06/14/2008	814	First MOTION for Leave to File Excess Pages for Response *to Motions for Summary Judgment* by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/14/2008)
06/14/2008	815	RESPONSE re 800 Statement, 804 Statement by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/14/2008)
06/16/2008	816	ORDER granting 808 Motion to File Exhibits Non-Electronically FURTHER ORDERED allowing Gonzalez Plaintiffs to file under

		separate cover non-electronic exhibits to Gonzalez Plaintiffs Consolidated Factual Response FURTHER ORDERED that Gonzalez Plaintiffs will deliver a hard copy and CDs of the exhibits to this Courts chambers on 6/16/08 FURTHER ORDERED that Gonzalez Plaintiffs will deliver CDs of the exhibits to counsel for the other parties on 6/16/08. Signed by Judge Roslyn O Silver on 6/16/08.(MAP) (Entered: 06/16/2008)
06/16/2008	824	Notice of Filing Proposed Pretrial Order filed by Friendly House, Georgia Morrison Flores, Naeem Abdul-Kareem, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Inter Tribal Council of Arizona, Inc, Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, John McCall, Southwest Voter Registration Education Project, Steve Kizer, Luciano Valencia, Valle Del Sol, Shelly Baker, Berta Manuz, Jan Brewer, Candace Owens, Christine Rhodes, Lynn A Constabile, Kelly Dastrup, Maria M Gonzalez, Laura Dean-Lytle,

Judy Dickerson, Donna J Hale, Patty Hansen, Susan Hightower Marlar, Gilberto Hoyos, Laurette Justman, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc. (Attachments: # 1 Exhibit A part 1, # 2 Exhibit A part 2, # 3 Exhibit A part 3, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D)(Hartman, Karen) (Entered: 06/16/2008)

06/18/2008 838 PROPOSED FINDINGS OF FACT *and Conclusions of Law by Twelve County Defendants, Defendant Pinal County and* by Defendants Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 06/18/2008)

06/18/2008 841 PROPOSED FINDINGS OF FACT *AND CONCLUSIONS OF LAW* by Plaintiffs Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin

American Citizens Arizona, League of Women Voters of Arizona. (Hartman, Karen) (Entered: 06/18/2008)

06/19/2008 842 PROPOSED FINDINGS OF FACT by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/19/2008)

06/20/2008 843 MOTION for Leave to File *Amended Proposed Findings of Fact* by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/20/2008)

06/20/2008	844	LODGED Proposed Amended Proposed Findings of Fact re: 843 MOTION for Leave to File *Amended Proposed Findings of Fact.* Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 06/20/2008)
06/20/2008	845	ORDER – IT IS ORDERED Defendants' 827 Motion for Leave to File is GRANTED. Signed by Judge Roslyn O Silver on 6/20/08. (SAT) (Entered: 06/20/2008)
06/20/2008	847	ORDER – On consideration of Gonzalez Plaintiffs' 843 Motion for Leave to File Amended Proposed Findings of Fact, IT IS HEREBY ORDERED that Gonzalez Plaintiffs may file an Amended Proposed Findings of Fact. Signed by Judge Roslyn O Silver on 6/20/08. (SAT) (Entered: 06/20/2008)

06/20/2008	848	PROPOSED FINDINGS OF FACT (Amended) by Plaintiffs Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (SAT) (Entered: 06/20/2008)
06/20/2008	851	MOTION to Strike re Portions of ITCA's Factual Submission in Response to Motion for Summary Judgment by Jan Brewer. (Attachments: # 1 Text of Proposed Order)(Bailey, Barbara) (Entered: 06/20/2008)
06/20/2008	852	REPLY in Support re 790 MOTION for Summary Judgment *Directed to ITCA Plaintiffs* filed by Jan Brewer. (Bailey, Barbara) (Entered: 06/20/2008)
06/20/2008	853	REPLY in Support re 803 First MOTION for Summary Judgment *and Memorandum Regarding Defendant's Joinder To State's Reply and Reply in Support of Motion for Summary Judgment* filed by Shelly Baker, Berta Manuz, Jan Brewer, Christine

Rhodes, Lynn A Constabile, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) (Entered: 06/20/2008)

06/20/2008 854 MOTION to Strike re Gonzalez Plaintiffs' Factual Submissions in Resposne [sic] to Motion for Summary Judgment by Defendants State of Arizona and Arizona Secretary of State by Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit, # 2 Text of Proposed Order)(Bailey, Barbara) (Entered: 06/20/2008)

06/20/2008 855 MOTION for Leave to File Excess Pages for Motion to Exceed Page Limits by Jan Brewer, State of Arizona. (Attachments: # 1 Text of Proposed Order) (Bailey, Barbara) (Entered: 06/20/2008)

06/20/2008 856 REPLY in Support re 799 MOTION for Summary Judgment *Directed to Gonzalez Plaintiffs*

		filed by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 06/20/2008)
06/20/2008	857	Joinder re 854 MOTION to Strike re Gonzalez Plaintiffs' Factual Submissions in Resposne [sic] to Motion for Summary Judgment by Defendants State of Arizona and Arizona Secretary of State *Defendants' Joinder To State Defendants' Motion To Strike* by Defendants Shelly Baker, Berta Manuz, Jan Brewer, Christine Rhodes, Lynn A Constabile, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, Gilberto Hoyos, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) (Entered: 06/20/2008)
06/23/2008	858	ORDER that plas shall file a response to dfts' motions to strike (851 and 854) by 6/24/08. Signed by Judge Roslyn O Silver on 6/23/2008. (LAD) (Entered: 06/23/2008)

06/23/2008	859	ORDER granting dft's 855 Motion for Leave to File Excess Pages. Signed by Judge Roslyn O Silver on 6/23/2008.(LAD) (Entered: 06/23/2008)
06/23/2008	861	Joinder *in the State Defendants' Reply in Support of State Defendants' Motion for Summary Judgment Directed to the Gonzalez Plaintiffs* by Defendants Laura Dean-Lytle, Gilberto Hoyos. (Roll, Chris) (Entered: 06/23/2008)
06/24/2008	868	RESPONSE in Opposition re 851 MOTION to Strike re Portions of ITCA's Factual Submission in Response to Motion for Summary Judgment filed by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Hartman, Karen) (Entered: 06/24/2008)
06/25/2008	869	MOTION for Leave to File Correct Document and Respond to Motion to Strike by Friendly House, Georgia Morrison Flares, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez,

		Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Perales, Nina) (Entered: 06/25/2008)
06/25/2008	870	LODGED Proposed Corrected Response to Motions for Summary Judgment. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Maria M Gonzalez. (Attachments: # 1 Exhibit corrected statement of facts, # 2 Exhibit corrected exhibit list)(Perales, Nina) (Entered: 06/25/2008)
06/25/2008	871	DECLARATION of of [sic] Nina Perales in support of Motion for Leave *to File Corrected Documents and Response to Motion to Strike* by Plaintiff Maria M Gonzalez. (Perales, Nina) (Entered: 06/25/2008)
06/25/2008	872	DECLARATION of of [sic] John Amaya in Support of Motion for Leave *to File Corrected Documents and Respond to Motion to Strike* by Plaintiff Maria M Gonzalez. (Perales, Nina) (Entered: 06/25/2008)
06/25/2008	873	MOTION for Leave to File Exhibits in Non-Electronic Form by Maria M Gonzalez. (Attachments: # 1 Text of Proposed Order)(Perales, Nina) (Entered: 06/25/2008)

06/25/2008	874	REPLY in Support re 854 MOTION to Strike re Gonzalez Plaintiffs' Factual Submissions in Resposne [sic] to Motion for Summary Judgment by Defendants State of Arizona and Arizona Secretary of State filed by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 06/25/2008)
06/26/2008	876	ORDER re 851 MOTION to Strike re Portions of ITCA's Factual Submission: ORDERED that dfts shall file a reply by 10:00 a.m. on 6/27/08. In that reply, they shall address, among other things, whether plas' expert reports are unreliable under Fed.R.Evid. 703. Signed by Judge Roslyn O Silver on 6/26/2008. (LAD) (Entered: 06/26/2008)
06/27/2008	879	REPLY in Support re 851 MOTION to Strike re Portions of ITCA's Factual Submission in Response to Motion for Summary Judgment filed by Jan Brewer. (Bailey, Barbara) (Entered: 06/27/2008)
06/27/2008	881	ORDER that Dfts shall file a list detailing the specific bases of its objections to Plas' facts and exhibits by 12:00 p.m. on 06/30/08. Plaintiffs shall file a response by 12:00 p.m. on 07/02/08. Dfts shall file a reply by 12:00 p.m. on

		07/03/08. The Court's decision on the motion for summary judgment will follow, and, assuming the motion is denied: IT IS FURTHER ORDERED the trial will begin at 8:30 a.m. on 07/08/08. IT IS FURTHER ORDERED the Final Pretrial Conference, set for June 30, 2008, is VACATED, and will not be rescheduled. Bench Trial set for 7/8/2008 08:30 AM before Judge Roslyn O Silver.. Signed by Judge Roslyn O Silver on 06/27/08. (DNH) (Entered: 06/27/2008)
06/27/2008	883	ORDER granting in part and denying in part 434 Motion to Dismiss Party. Maria Gonzalez, Naeem Abdul-Kareem and Luciano Valencia are DISMISSED. Signed by Judge Roslyn O Silver on 06/27/08.(DNH) (Entered: 06/27/2008)
06/30/2008	884	ORDER by 12:00 p.m. on 07/03/08, Plaintiffs shall: (1) identify whether each cause of action above is a facial or as-applied challenge; (2) if as-applied, identify to which Plaintiff(s) it is applied; and (3) provide specific citation to the complaint for each of the above. IT IS FURTHER ORDERED by 5:00 p.m. on 07/03/08, Defendants may file a

response. No reply shall be allowed.. Signed by Judge Roslyn O Silver on 06/30/08. (DNH) (Entered: 06/30/2008)

06/30/2008 888 MOTION for Leave to File Response in Oppositon [sic] to Defs Reply in Support of Motion to Strike Portions of ITCA's Summary Judgment Evidence by Maria M Gonzalez. (Attachments: # 1 Text of Proposed Order) (Perales, Nina) (Entered: 06/30/2008)

06/30/2008 889 LODGED Proposed Gonzalez Pls Response in Opposition to Defs Reply in Support of Motion to Strike Portions of ITCA's Pls Summary Judgment Evidence re: 888 MOTION for Leave to File Response in Oppositon [sic] to Defs Reply in Support of Motion to Strike Portions of ITCA's Summary Judgment Evidence. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Maria M Gonzalez. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C-D) (Perales, Nina) (Entered: 06/30/2008)

06/30/2008 890 MOTION for Sanctions against Yuma County Defendants *in the Form of Adverse Inference for Spoliation of Evidence* by Maria M Gonzalez. (Attachments: # 1 Text

of Proposed Order) (Perales, Nina) (Entered: 06/30/2008)

07/01/2008 892 ORDER granting 888 Motion for Leave to File Sur-Reply, Signed by Judge Roslyn O Silver on 07/01/08.(DNH) (Entered: 07/01/2008)

07/01/2008 900 GONZALEZ PLAINTIFF'S RESPONSE IN OPPOSITION TO 879 Reply in Support of Motion 851 to Strike Portions of ITCA's Factual Submisission [sic] by (DNH) Modified on 7/3/2008 to Correct Docket text Modified on 7/3/2008 (DNH). (Entered: 07/02/2008)

07/02/2008 897 ORDER that Order 894 is VACATED FURTHER ORDERED that the Motion for Leave to File 869 shall be reinstated FURTHER ORDERED that the Motion for Sanctions 890 shall be reinstated. Signed by Judge Roslyn O Silver on 7/1/08. (MAP) (Entered: 07/02/2008)

07/02/2008 899 RESPONSE in Opposition re 851 MOTION to Strike re Portions of ITCA's Factual Submission in Response to Motion for Summary Judgment *Re: Notice of Defendants' Specific Objections* filed by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe,

		League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Hartman, Karen) (Entered: 07/02/2008)
07/03/2008	904	Notice re Notice Regarding Specific Legal Challenges by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona (Hartman, Karen) (Entered: 07/03/2008)
07/03/2008	905	Notice re Remaining Claims by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc. (Bernal, Diego) (Entered: 07/03/2008)
07/03/2008	906	OBJECTION re 902 Stipulation, *between Gonzalez Plaintiffs and Coconino County Defendants* by Defendants Jan Brewer, State of Arizona. (LaMar, Steven) (Entered: 07/03/2008)

07/03/2008	907	OBJECTION re 903 Stipulation, *between Gonzalez Plaintiffs' and Navajo County Defendants* by Defendant State of Arizona. (LaMar, Steven) (Entered: 07/03/2008)
07/03/2008	913	BRIEF re 884 Order, *re Position of Defendants on Facial vs. As-Applied Challenges Asserted by Gonzalez and ITCA Plaintiffs'* by Defendants Jan Brewer, State of Arizona filed by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 07/03/2008)
07/03/2008	917	Joinder re 913 Brief (Non Appeal) *Twelve County Defendants' Joinder To State Defendants' Position On Facial VS. As-Applied Challenges Asserted By Gonzalez Plaintiffs* by Defendants Shelly Baker, Berta Manuz, Jan Brewer, Christine Rhodes, Lynn A Constabile, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, State of Arizona, Allen Tempert, Ann Wayman-Trujillo,

Wendy John. (Wilenchik, Dennis) (Entered: 07/03/2008)

07/07/2008 922 Joinder *to State Defendants' Position on Facial vs. As-Applied Challenges Asserted by Gonzalez and ITCA Plaintiffs* by Defendants Laura Dean-Lytle, Gilberto Hoyos. (Roll, Chris) (Entered: 07/07/2008)

07/08/2008 929 MOTION for Admit Deposition Testimony and Declarations by Jesus M Gonzalez. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2 part1, # 3 Exhibit 2 part 2, # 4 Exhibit 3 part 1, # 5 Exhibit 3 part 2, # 6 Exhibit 3 part 3, # 7 Exhibit 3 part 4, # 8 Exhibit 4 and 5, # 9 Exhibit 6 part 1, # 10 Exhibit 6 part 2, # 11 Exhibit 6 part 3, # 12 Exhibit 7 part 1, # 13 Exhibit 7 part 2, # 14 Exhibit 7 part 3, # 15 Exhibit 8 part 1, # 16 Exhibit 8 part 2, # 17 Exhibit 8 part 3, # 18 Exhibit 9 part 1, # 19 Exhibit 9 part 2, # 20 Exhibit 10-13, # 21 Text of Proposed Order) (Perales, Nina) (Entered: 07/08/2008)

07/09/2008 933 STIPULATION *Gonzalez Plaintiffs' and Twelve County Defendants' Stipulation re Authenticity and Withdrawal of Subpoenas* by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community

		Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Shelly Baker, Berta Manuz, Susan Hightower Marler, Christine Rhodes, Lynn A Constabile, Judy Dickerson, Donna J Hale, LeNora Johnson, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Dixie Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John, Bernie Abeytia, Chicanos Por La Causa, Inc.. (Attachments: # 1 Text of Proposed Order) (Wilenchik, Dennis) (Entered: 07/09/2008)
07/09/2008	936	ORDER that Defendants' Motions for Summary Judgment 790, 799 and 803 are denied without prejudice and may be subject to reurging at the end ofthe [sic] trial as Rule 52(c) motions. Signed by Judge Roslyn O Silver on 7/9/08.(MAP) (Entered: 07/09/2008)
07/09/2008	938	ORDER granting in part and denying in part 851 Motion to Strike Gonzalez Plaintiffs Factual Submissions in Response to Motion for Summary Judgment. SEE

		ORDER FOR FULL DETAILS. Signed by Judge Roslyn O Silver on 7/9/08.(MAP) (Entered: 07/09/2008)
07/09/2008	939	ORDER granting in part and denying in part 854 Motion to Strike ITCA Plaintiffs Factual Submissions in Response to Motion for Summary Judgment, SEE DOCUMENT FOR FULL DETAILS. Signed by Judge Roslyn O Silver on 7/9/08.(MAP) (Entered: 07/09/2008)
07/09/2008	942	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial begun on 7/9/2008. (Court Reporter Laurie Adams.) CLB) (Entered: 07/10/2008)
07/10/2008	945	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial (Day 2) held on 7/10/2008. (Court Reporter Linda Schroeder.) (MAP) (Entered: 07/11/2008)
07/15/2008	967	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial (Day 3) held on 7/15/2008. (Court Reporter Elaine Cropper.) (CLB) (Entered: 07/16/2008)
07/16/2008	975	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial (Day 4)held on

		7/16/2008. (Court Reporter Elaine Cropper.) (CLB) (Entered: 07/17/2008)
07/17/2008	978	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial (Day 5) held on 7/17/2008. (Court Reporter Elaine Cropper.) (CLB) (Entered: 07/18/2008)
07/18/2008	982	Minute Entry. Proceedings held before Judge Roslyn O Silver: Bench Trial (Day 6) completed on 7/18/2008. (Court Reporter Elaine Cropper.) (CLB) (Entered: 07/18/2008)
7/18/2008	984	ORDER granting 959 Motion to Admit State-Produced Exhibits into Evidence FURTHER ORDERED that the following Gonzalez Plaintiffs trial exhibits are entered into evidence: See Order for List of Exhibits. Signed by Judge Roslyn O Silver on 7/18/08.(MAP) (Entered: 07/18/2008)
07/21/2008	1002	ORDER granting 989 Motion for Admission of Trial Exhibits. Trial exhibits 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1118, 1119, 1123, 1124, 1128, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1144, 1145, 1148, 1149, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163,

		1166, 1167, 1168, 1169, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1191*, 1193, 1198, 1202, 1203, 1205, 1207, 1208, 1216, 1217, 1218, 1343a-1343q, 1346, 1347 and 1351 are admitted. Signed by Judge Roslyn O Silver on 07/18/08.(DNH) (Entered: 07/21/2008)
07/21/2008	1005	ORDER granting 990 Motion Admit Exhibits Not Objected To. The following Gonzalez Plaintiffs' trial exhibits are entered into evidence: 8, 241, 252, 278, 319, 321, 404, 405, 445, 446, 447, 450, 601, 602, 603, 604, 605, 606, 609, 627, 647, 330, 218, 245, 246, 204, 9, 42, 210, 214, 215, 218, 219, 221, 223, 225, 241, 243, 246, 247, 249, 252, 257, 258, 263, 264, 265, 266, 270, 271, 274, 276, 280, 281, 282, 284, 292, 294, 337, 410, 417, 436, 446, 447, 472, 502, 515, 518, 631, 632, 635, 123, 226, 442, 248, 251, 253, 303, 318, 443, 444, 453, 454, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 451, 452, 624, 625, 626, 622, 623, 406, 486, 240, 152, 14, 98, 420, 314, 24, 25, 39, 100, 101, 108, 114, 131, 316, 500, 511, 562, 584, 585, 586, 588, 620, 670, 700, 702, 715, 718, 960. Signed by Judge Roslyn O Silver on 07/21/08. (DNH) (Entered: 07/21/2008)

07/22/2008	1009	STIPULATION *to Admit Deposition Designations* by Friendly House, Georgia Morrison Flores, Project Vote, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Text of Proposed Order)(Bernal, Diego) (Entered: 07/22/2008)
07/23/2008	1014	ORDER granting 1009 Stipulation: The depositions listed in this order are admitted into the trial record. See Order for list. Signed by Judge Roslyn O Silver on 07/22/08. (DNH) (Entered: 07/23/2008)
07/24/2008	1017	ORDER granting 1016 Motion for Clarification. The Court hereby clarifies that the deposition designations of Georgia Morrison-Flores, Gerri Ratliff and Michael Quinn were admitted into the trial record.. Signed by Judge Roslyn O Silver on 07/24/08.(DNH) (Entered: 07/24/2008)
07/25/2008	1022	TRIAL BRIEF *Twelve County Defendants' Closing Argument* by Shelly Baker, Berta Manuz, Jan Brewer, Christine Rhodes, Lynn A Constabile, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, LeNora Johnson, Patti Madrill, Joan McCall, Melinda Meek, Dixie

Mundy, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) (Entered: 07/25/2008)

07/25/2008 1023 TRIAL BRIEF *Closing Argument* by Jan Brewer, State of Arizona. (Bailey, Barbara) (Entered: 07/25/2008)

07/25/2008 1024 TRIAL BRIEF *Post Trial Brief and Notice of Filing Proposed Findings of Fact and Conclusions of Law* by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Attachments: # 1 Exhibit A)(Hartman, Karen) (Entered: 07/25/2008)

07/25/2008 1025 Proposed Findings of Fact by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Hartman, Karen) (Entered: 07/25/2008)

07/25/2008 1026 MOTION for Leave to File Excess Pages *for Post Trial Memorandum*

by Friendly House, Georgia Morrison Flores, Jesus M Gonzalez, Debbie Lopez, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Text of Proposed Order) (Bernal, Diego) (Entered: 07/25/2008)

07/25/2008 1027 LODGED Proposed Post Trial Memorandum re: 1026 MOTION for Leave to File Excess Pages *for Post Trial Memorandum*. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Georgia Morrison Flores, Jesus M Gonzalez, Debbie Lopez, Valle Del Sol, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 07/25/2008)

07/28/2008 1028 ORDER – The Court considered Gonzalez Plaintiffs' 1026 Motion for Leave to Exceed Page Limit in their Post-Trial Memorandum. IT IS HEREBY ORDERED that Gonzalez Plaintiffs' post-trial memorandum that was filed as a lodged proposed document shall be entered with the Court. Signed by Judge Roslyn O Silver on 7/28/08. (SAT) (Entered: 07/28/2008)

07/28/2008 1029 GONZALEZ Plaintiffs' POST-TRIAL MEMORANDUM by Plaintiffs Friendly House, Georgia Morrison

Flores, Jesus M Gonzalez, Debbie Lopez, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (SAT) (Entered: 07/28/2008)

07/29/2008 1030 Proposed Findings of Fact by Jesus M Gonzalez, Valle Del Sol, Bernie Abeytia, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 07/29/2008)

07/30/2008 1031 RESPONSE to Motion re 1026 MOTION for Leave to File Excess Pages *for Post Trial Memorandum Twelve County Defendants' Response to Plaintiffs' Post-trial Memorandum* filed by Shelly Baker, Berta Manuz, Christine Rhodes, Lynn A Constabile, Judy Dickerson, Donna J Hale, Susan Hightower Marlar, Linda Haught Ortega, Patti Madrill, Joan McCall, Melinda Meek, Brad R Nelson, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, F Ann Rodriguez, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo, Wendy John. (Wilenchik, Dennis) (Entered: 07/30/2008)

07/30/2008 1032 TRIAL BRIEF *RESPONSE TO PLAINTIFFS' CLOSING ARGUMENTS* by Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit Exhibit A) (Brennan, Carrie) (Entered: 07/30/2008)

07/30/2008	1033	BRIEF re 1023 Trial Brief *Consolidated Response to Closing Arguments by State and County Defendants* by Plaintiff Jesus M Gonzalez filed by Jesus M Gonzalez. (Perales, Nina) (Entered: 07/30/2008)
07/30/2008	1034	TRIAL BRIEF *Post-Trial Response* by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. (Hartman, Karen) (Entered: 07/30/2008)
07/31/2008	1035	Notice re P' aintiffs' Joint Advisory to the Court regarding cases in which Jeffrey Zax has testified by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Inter Tribal Council of Arizona, Inc, Jesus M Gonzalez, Debbie Lopez, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por

		La Causa, Inc. (Perales, Nina) (Entered: 07/31/2008)
08/01/2008	1036	MOTION to Amend/Correct re Post-Trial Mem. by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit, # 2 Exhibit Strike/ Underline Copy, # 3 Text of Proposed Order)(Bernal, Diego) (Entered: 08/01/2008)
08/01/2008	1037	LODGED Proposed Corrected Post-Trial Mem. re: 1036 MOTION to Amend/Correct re Post-Trial Mem.. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Friendly House, Georgia Morrison Flores, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Bernal, Diego) (Entered: 08/01/2008)

08/01/2008	1038	RESPONSE to Motion re 1036 MOTION to Amend/Correct re Post-Trial Mem. filed by Jan Brewer, State of Arizona. (Attachments: # 1 Exhibit Exhibit A)(Brennan, Carrie) (Entered: 08/01/2008)
08/04/2008	1039	REPLY in Support re 1036 MOTION to Amend/Correct re Post-Trial Mem. filed by Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc.. (Attachments: # 1 Exhibit A-I)(Bernal, Diego) (Entered: 08/04/2008)
08/20/2008	1040	ORDER granting Gonzalez Plas' 1036 Motion to Amend Post-Trial Brief. Signed by Judge Roslyn O Silver on 08/20/08.(ESL) (Entered: 08/20/2008)
08/20/2008	1041	ORDER: FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Clerk of Court shall enter judgment on behalf of the Defendants. IT IS FURTHER ORDERED this case shall be terminated. Signed by Judge Roslyn O Silver on 08/20/08. (ESL) (Entered: 08/20/2008)

08/20/2008	1042	CLERK'S JUDGMENT that pursuant to the Court's order filed 08/20/08, judgment is entered in favor of defendants and against plaintiff. Plaintiff to takenothing [sic], and complaint and action are dismissed. (ESL) (Entered: 08/20/2008)
09/04/2008	1043	Joint MOTION to Reopen Case *to Reflect Admission of Exhibits* by Inter Tribal Council of Arizona, Inc, Jesus M Gonzalez. (Attachments: # 1 Text of Proposed Order)(Perales, Nina) (Entered: 09/04/2008)
09/08/2008	1044	ORDER granting in part and denying in part 1001 MOTION for Admission of Trial Exhibits by Jesus M Gonzalez. FURTHER ORDERED the ruling on each specific exhibit is as follows: (See Order for detailed list) Signed by Judge Roslyn O Silver on 09/08/08. (DNH) (Entered: 09/08/2008)
09/16/2008	1045	NOTICE OF APPEAL to 9th Circuit re 1041 ORDER, 1042 Judgment, by Friendly House, Georgia Morrison Flores, Common Cause, Project Vote, Association of Community Organizations for Reform Now, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Maria M Gonzalez, Bernie Abeytia, Arizona Hispanic

		Community Forum, Chicanos Por La Causa, Inc.. Filing fee received: $ 455.00, receipt number 0970000000002224965. (Perales, Nina) Modified on 9/18/2008 (SAT). DOCKET TEXT MODIFIED TO ADD DOCUMENT LINKAGE. (Entered: 09/16/2008)
09/19/2008	1047	NOTICE OF APPEAL to 9th Circuit re 1041 Order, 1042 Judgment, by Inter Tribal Council of Arizona, Inc, Arizona Advocacy Network, Steve M Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona. Filing fee received: $ 455.00, receipt number 0970000000002237488. (Attachments: # 1 Civil Appeals Docketing Statement)(Hartman, Karen) Modified on 9/19/2008 (SAT). DOCKET TEXT MODIFIED TO ADD DOCUMENT LINKAGE. (Entered: 09/19/2008)
09/25/2008	1049	Ninth Circuit Case Number 08-17094 for 1045 Notice of Appeal. (DNH) (Entered: 09/25/2008)
09/29/2008	1050	Ninth Circuit Case Number 08-17094 for 1045 Notice of Appeal. (LSP) (Entered: 09/30/2008)
09/30/2008	1052	Ninth Circuit Case Number 08-17115 for 1047 Notice of Appeal. (LSP) (Entered: 09/30/2008)

10/02/2008	1053	Ninth Circuit Case Number 08-17115 for 1047 Notice of Appeal. (LSP) (Entered: 10/02/2008)
10/23/2008	1054	ORDER denying as moot 1043 Motion to Reopen Case to Reflect Admission of Exhibits. Signed by Judge Roslyn O Silver on 10/23/08. (DMT,) (Entered: 10/23/2008)
12/08/2008	1055	ORDER of 9th Circuit, appeal case number 08-17094 and 08-17115, as to 1045 Notice of Appeal, and 1047 Notice of Appeal. Appelants' unopposed motion for an extension of time to file the opening brief is granted. Opening brief in 08-17094 due 01/20/09 answering brief due 02/19/09; optional reply brief due 14 days after service of the ansering [sic] brief. (ESL) (Entered: 12/08/2008)
02/03/2009	1056	ORDER of 9th Circuit, as to 1045 Notice of Appeal and 1047 Notice of Appeal, appeal case numbers 08-17094 and 08-17115. The unopposed motion for leave to file opening brief out of time is granted. The opening brief in no. 08-17094 already received is ordered filed. The answering brief for no. 08-17094 is due 03/02/09. The optional reply brief for no. 08-17094 is due 14 days after service of the answering brief for no. 08-17094.(ESL) (Entered: 02/03/2009)

02/25/2009	1057	ORDER of 9th Circuit that Appellees' unopposed motion for an extension of time to file an answering brief for no. 08-17094 is granted. The answering brief in no. 08-17094 is due 3/23/09 re appeal case number 08-17094 and 08-17115, as to 1045 Notice of Appeal and 1047 Notice of Appeal.(TLJ) (Entered: 02/25/2009)
03/04/2009	1058	ORDER of 9th Circuit, remaining briefing schedule reset; re appeal case, number 08-17094 and 08-17115, as to 1045 Notice of Appeal and 1047 Notice of Appeal. (cc: BAS) (LSP) (Entered: 03/04/2009)
04/10/2009	1059	ORDER of 9th Circuit, appeal case number 08-17094; 08-17115, as to 1045 Notice of Appeal, filed by Jesus M Gonzalez, et al. and 1047 Notice of Appeal, filed by League of United Latin American Citizens Arizona, et al.. Appellants' unopposed motion for an extension of time to file the reply brief for no. 08-17094 is granted. The reply brief for no. 08-17094 is due 04/13/09. Court records do not currently reflect that the district court has issued the certificate of record. Appellant shall monitor the issuance of the certificate of record. (ESL) (Entered: 04/10/2009)

05/12/2009	1060	ORDER of 9th Circuit, appeal case number 08-17094; 08-17115, that appellants' unopposed motion for leave to file a late reply is granted. The reply brief already received is ordered filed as to 1045 Notice of Appeal and 1047 Notice of Appeal. (See document for details). (LAD) (Entered: 05/12/2009)
05/20/2009	1062	CERTIFICATE OF RECORD TRANSMITTED TO 9TH CIRCUIT COURT OF APPEALS re 1045 Notice of Appeal, 1047 Notice of Appeal (KMG) (Entered: 05/20/2009)
11/12/2010	1064	ORDER of USCA, Because a consideration of the relevant factors establishes that Appellants are not entitled to injunctive relief, Appellants' emergency motion is denied, as to 1045 Notice of Appeal (KMG) (Entered: 11/12/2010)
06/29/2012	1066	MANDATE of USCA, this constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, re 08-17094 and 08-17115, as to 1045 Notice of Appeal, and 1047 Notice of Appeal. (Attachments: # 1 Opinion, # 2 NDA)(KMG) (Entered: 06/29/2012)
07/05/2012	1067	ORDER re 1066 USCA Mandate: ORDERED that no later than July

		9, 2012, the parties shall file a joint status report indicating what further proceedings, if any, should occur in this Court. If the parties believe further proceedings are necessary, they shall propose specific deadlines. Signed by Chief Judge Roslyn O Silver on 7/5/12. (SJF) (Entered: 07/05/2012)
07/09/2012	1071	*JOINT STATUS REPORT AND MOTION FOR ENTRY OF PRELIMINARY ORDER by Inter Tribal Council of Arizona Incorporated. (Attachments: # 1 Text of Proposed Order)(Kengle, Robert) *Modified to add motion type on 7/10/2012 (LSP). (Entered: 07/09/2012)
07/11/2012	1073	ORDER that effective as of this date, Defendants shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship. See PDF document for details. In the event that this Court's final judgment issues before the Supreme Court's disposition of the Defendants' petition for certiorari, any application for attorneys' fees shall be due within thirty days following the Supreme Court's determination. This Court shall retain jurisdiction to enforce the terms of this

		Order, to address the matters raised by the Parties in their briefs filed pursuant to this Order. Signed by Chief Judge Roslyn O Silver on 7/11/12. (LSP) (Entered: 07/11/2012)
07/13/2012	1074	BRIEF re 1073 Order,, by Plaintiffs Naeem Abdul-Kareem, Bernie Abeytia, Arizona Hispanic Community Forum, Association of Community Organizations for Reform Now, Chicanos Por La Causa Incorporated, Common Cause, Georgia Morrison Flores, Friendly House, Jesus M Gonzalez, Maria M Gonzalez, Debbie Lopez, Project Vote, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol. (Perales, Nina) (Entered: 07/13/2012)
07/13/2012	1075	BRIEF re 1073 Order,, *ITCA Plaintiffs' Brief on Remedy* by Plaintiff Inter Tribal Council of Arizona Incorporated. (Kengle, Robert) (Entered: 07/13/2012)
07/19/2012	1076	*RESPONSE to 1074 and 1075 Plaintiffs' Request for Additional Injunctive Relief and Brief on Remedy by Defendants Arizona, State of, Janice K Brewer. (Collins, Thomas) *Modified to add document numbers on 7/20/2012 (LSP). (Entered: 07/19/2012)

07/24/2012	1080	REPLY re 1076 Response *ITCA Plaintiffs' Reply Brief on Remedy* by Plaintiff Inter Tribal Council of Arizona Incorporated. (Kengle, Robert) (Entered: 07/24/2012)
07/24/2012	1081	REPLY re 1074 Brief (Non Appeal), 1076 Response, 1073 Order,, by Plaintiffs Naeem Abdul-Kareem, Bernie Abeytia, Arizona Hispanic Community Forum, Association of Community Organizations for Reform Now, Chicanos Por La Causa Incorporated, Common Cause, Georgia Morrison Flores, Friendly House, Jesus M Gonzalez, Maria M Gonzalez, Debbie Lopez, Project Vote, Southwest Voter Registration Education Project, Luciano Valencia, Valle Del Sol. (Espiritu, Nicholas) (Entered: 07/24/2012)
08/06/2012	1082	ORDER – IT IS ORDERED no later than August 8, 2012 the parties shall file a joint proposed order or competing proposals as outlined in this order. Signed by Chief Judge Roslyn O Silver on 8/3/12. (CLB) (Entered: 08/06/2012)
08/07/2012	1083	MOTION for Extension of Time TO ADDRESS COURTS AUGUST 6, 2012 ORDER by Arizona, State of, Janice K Brewer. (Attachments: # 1 Text of Proposed

Order)(Collins, Thomas) (Entered: 08/07/2012)

08/08/2012 1084 RESPONSE to Motion re 1083 MOTION for Extension of Time TO ADDRESS COURTS AUGUST 6, 2012 ORDER filed by Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa Incorporated, Georgia Morrison Flores, Jesus M Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol. (Perales, Nina) (Entered: 08/08/2012)

08/08/2012 1085 RESPONSE to Motion re 1083 MOTION for Extension of Time TO ADDRESS COURTS AUGUST 6, 2012 ORDER *Joining 1084* filed by Inter Tribal Council of Arizona Incorporated. (Kengle, Robert) (Entered: 08/08/2012)

08/08/2012 1086 ORDER granting 1083 Defendants' Motion for Extension of Time. Signed by Chief Judge Roslyn O. Silver on 8/8/2012.(ROS) (Entered: 08/08/2012)

08/13/2012 1087 NOTICE re of Filing and Advisory to the Court by Jesus M Gonzalez re 1082 Order *to Submit Proposed Remedial Order.* (Attachments: # 1 Exhibit Proposed Remedial Order)(Perales, Nina) (Entered: 08/13/2012)

08/13/2012	1088	MOTION for Reconsideration *of Portions of August 6, 2012 Order and Memorandum in Support of Proposed Order* by Arizona, State of, Shelly Baker, Janice K Brewer, Lynn A Constabile, Laura Dean-Lytle, Judy Dickerson, Donna J Hale, Wendy John, Steve Kizer, Patti Madrill, Berta Manuz, Susan Hightower Marlar, Joan McCall, Melinda Meek, Brad R Nelson, Linda Haught Ortega, Karen Osborne, Yvonne Pearson, Penny L Pew, Helen Purcell, Christine Rhodes, Suzie Sainz, Thomas Schelling, Allen Tempert, Ann Wayman-Trujillo. (Attachments: # 1 Exhibit Osborne Affidavit, # 2 Exhibit Stender Declaration, # 3 Text of Proposed Order Proposed Order)(Collins, Thomas) (Entered: 08/13/2012)
08/14/2012	1089	*NOTICE of Errata re 1087 NOTICE of Filing and Advisory to the Court by Plaintiff Jesus M Gonzalez. (Perales, Nina) *Modified to add document number on 8/14/2012 (LSP). (Entered: 08/14/2012)
08/14/2012	1090	*AMENDED DOCUMENT re 1087 Notice of Filing Proposed Remedial Order. Filed by Bernie Abeytia, Arizona Advocacy Network, Arizona Hispanic Community Forum,

Chicanos Por La Causa Incorporated, Common Cause, Georgia Morrison Flores, Friendly House, Steve M Gallardo, Jesus M Gonzalez, Inter Tribal Council of Arizona Incorporated, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, Debbie Lopez, People For the American Way Foundation, Project Vote, Southwest Voter Registration Education Project, Valle Del Sol. (Perales, Nina) *Modified to correct event type and to add document number on 8/14/2012 (LSP). (Entered: 08/14/2012)

08/15/2012 1093 ORDER denying as moot 1071 Motion for Entry of Preliminary Order; denying 1072 Motion to Withdraw as Attorney; and denying 1088 Motion for Reconsideration. See PDF document for details. Signed by Chief Judge Roslyn O Silver on 8/15/12.(LSP) (Entered: 08/15/2012)

09/28/2012 1094 * MOTION Interim Approval of Changes to Election Procedures Manual and MOTION for Empaneling of Three Judge Panel by Arizona, State of, Janice K Brewer. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Text of Proposed Order, # 4 Text of Proposed Order for panel)(Collins, Thomas). Added

MOTION on 10/1/2012 (REW). (Entered: 09/28/2012)

10/01/2012 1095 TEXT ONLY ORDER re 1094 Motion Interim Approval – IT IS ORDERED Plaintiffs shall file a response to the Motion for Interim Approval 1094 no later than noon on October 2, 2012. The State of Arizona shall file its reply no later than noon on October 3, 2012. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (CLB) (Entered: 10/01/2012)

10/02/2012 1096 RESPONSE in Opposition to Motion re 1094 MOTION Interim Approval of Changes to Election Procedures Manual MOTION for Empaneling of Three Judge Panel filed by Inter Tribal Council of Arizona Incorporated. (Kengle, Robert) (Entered: 10/02/2012)

10/02/2012 1097 RESPONSE in Opposition re 1094 MOTION Interim Approval of Changes to Election Procedures Manual MOTION for Empaneling of Three Judge Panel filed by Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa Incorporated, Common Cause, Georgia Morrison Flores, Friendly House, Jesus M Gonzalez, Debbie Lopez, Project Vote, Southwest Voter Registration

		Education Project. (Perales, Nina) (Entered: 10/02/2012)
10/03/2012	1098	REPLY to Response to Motion re 1094 MOTION Interim Approval of Changes to Election Procedures Manual MOTION for Empaneling of Three Judge Panel filed by Arizona, State of, Janice K Brewer. (Attachments: # 1 Declaration)(Collins, Thomas) (Entered: 10/03/2012)
10/09/2012	1099	NOTICE re of Section 5 Preclearance by Arizona, State of, Janice K Brewer . (Attachments: # 1 Exhibit Letter)(Collins, Thomas) (Entered: 10/09/2012)
10/10/2012	1100	ORDER denying as moot 1094 Motion for Interim Approval. Signed by Chief Judge Roslyn O Silver on 10/10/12.(CLB) (Entered: 10/10/2012)

U.S. District Court
DISTRICT OF ARIZONA (Prescott Division)
CIVIL DOCKET FOR
CASE #: 3:06-cv-01362-ROS

Date Filed	#	Docket Text
05/24/2006	1	COMPLAINT, filed by Rep. Steve M. Gallardo, The Inter Tribal Council of Arizona, Inc., The League of Women Voters of Arizona, The Hopi Tribe, The League of United Latin American Citizens Arizona, The Arizona Advocacy Network, The People For the American Way Foundation. (Attachments: # 1 Civil Cover Sheet)(Rosenbaum, David) (Entered: 05/24/2006)
06/06/2006	13	CONSOLIDATION ORDER – MEMBER CASE. (Lead case: CV 06-1268-PHX-ROS) Case reassigned to Judge Roslyn O Silver for all further proceedings. Judge James A Teilborg terminated. That the ITCA Plas' Motion to Consolidate (Doc.#20 in Lead case) is granted. All future filings in Inter Tribal Council of Arizona, et al., v. Brewer, Case No. CV 06-1362, shall be filed in CV 061268; FURTHER ORDERED that the ITCA Plas will be permitted to participate in the expedited briefing schedule set forth on 5/17/06; FURTHER ORDERED that all

		parties shall appear at the TRO hearing on 6/9/06. Signed by Judge Roslyn O Silver on 6/6/06. (KMG,) Modified on 6/7/2006 (DNH,). (Entered: 06/06/2006)
05/27/2008	16	ORDER granting Stipulation 754 in Case CV-06-1268-PHX-ROS. 2006). ITCA and Hopi Plaintiffs are DISMISSED WITHOUT PREJUDICE as to the to the [sic] Procedures and the polling place identification requirements of A.R.S. § 16-579 only. This Order does not dismiss any claims or allegations set forth in the Complaint challenging the proof of citizenship requirements for voter registration.. Signed by Judge Roslyn O Silver on 05/27/08. (DNH) (Entered: 05/27/2008)
08/20/2008	17	ORDER: FINDINGS OF FACT AND CONCLUSIONS OF LAW the Clerk of Court shall enter judgment on behalf of the Defendants. IT IS FURTHER ORDERED this case shall be terminated. Signed by Judge Roslyn O Silver on 08/20/08. (ESL,) (Entered: 08/20/2008)
08/20/2008	18	CLERK'S JUDGMENT that pursuant to the Courts order filed August 20, 2008, judgment is entered in favor of defendants

and against plaintiff. Plaintiff to take nothing, and complaint and action are dismissed.(ESL,) (Entered: 08/20/2008)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 06-16521

08/21/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 8/21/06; appellee's designation of RT is due 8/31/06,, ; appellant shall order transcript by 9/11/06; court reporter shall file transcript in DC by 10/11/06; certificate of record shall be filed by 10/18/06 ; appellants opening brief is due 11/27/06; appellees' brief is due 12/27/06,, ; appellants' reply brief is due 1/10/07; [06-16521] (GR)
09/15/2006	6	Received copy of District Court order filed on 9/11/06 denying plaintiff/aplt's mtns for Prelminary [sic] Injunction & mtn to expedite; granting the mtn to exceed pg limits; orders parties to submit simultaneous briefing on whether the identification requirements for registration constitute a poll tax by 9/18/06. Simultaneous responses are due 9/25/06. No replies are allowed. Further orders the Navajo Nation Plaintiffs to submit addl briefing on their Voting Right Act & Civil Rights Act claims by 9/25/06.

		Dedts' response due 10/2/06. Rpy due 10/6/06. A hearing for the crt to consider addl facts on the Voting Rights Act & Civil Rights Act claims will be held 10/19/06 at 9:00 a.m. (CASEFILE) [06-16521] (MF)
10/27/2006	7	Filed order MOATT (JZZ) The court sua sponte consolidates appeal no. 06-16521 with nos. 06-16702 and 06-16706, which were previously consolidated. The brfing sch established in nos. 06-16702 and 06-16706 shall govern these appeals. [06-16521, 06-16702, 06-16706] (BJB)
11/24/2006	18	Filed original and 15 copies Appellant Maria M. Gonzalez in 06-16702, Appellant The Inter Tribal in 06-16706 opening brief (Informal: no) 62 pages and five excerpts of record in 4 volumes; served on 11/22/06 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
11/30/2006	22	Filed Amicus The Brennan Centers motion to become amicus curiae served on 11/29/06 (PANEL) [6024943] (BJB)
12/08/2006	25	Filed Amicus League of Women Vot in 06-16521, Amicus League of Women Vot in 06-16702, Amicus League of Women Vot in 06-16706's motion to become amicus curiae, served on 12/5/06 (PANEL) [6031683] (BJB)

12/18/2006	27	Filed order (Deputy Clerk: hh) granting amicus motion to become amicus [25] The brief amicus curiae of the League of Women Voters of the U.S. in Support of Plaintiffs/Aplts and Reversal received by the Clerk of the Court 12/8/06 is hereby FILED. [06-16521, 06-16702, 06-16706] (BJB)
12/18/2006	28	Filed original and 15 copies League of Women Voters brief of 31 pages; served on 12/5/06 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
12/21/2006	31	Filed original and 7 copies Appellee The Inter Tribal in 06-16521 brief, 17 pages, 0 Exc, vols: served on 12/20/06 (PANEL) minor defcy: insufficient copies and no stm of rel cases; Notified counsel. [06-16521, 06-16702, 06-16706] record on appeal due 1/8/07 in 06-16521; (BJB)
12/21/2006	33	Filed original and 15 copies appellee State of Arizona in 06-16702, Jan Brewer in 06-16702, Shelly Baker in 06-16702, Berta Manuz in 06-16702, Lynn Constable in 06-16702, Kelly Dastrup in 06-16702, Laura Dean-Lytle in 06-16702, Judy Dickerson in 06-16702, Donna Hale in 06-16702, Susan Hightower Marlar in 06-16702, Gilberto

Hoyos in 06-16702, Laurette Justman in 06-16702, Candace Owens in 06-16702, Patty Hansen in 06-16702, Christine Rhodes in 06-16702, Linda Haught Ortega in 06-16702, Dixie Mundy in 06-16702, Brad Nelson in 06-16702, Karen Osborne in 06-16702, Yvonne Pearson in 06-16702, Penny Pew in 06-16702, Helen Purcell in 06-16702, F. Ann Rodriguez in 06-16702, State of Arizona in 06-16706, Jan Brewer in 06-16706, Shelly Baker in 06-16706, Berta Manuz in 06-16706, Lynn Constable in 06-16706, Kelly Dastrup in 06-16706, Laura Dean-Lytle in 06-16706, Judy Dickerson in 06-16706, Donna Hale in 06-16706, Susan Hightower Marlar in 06-16706, Gilberto Hoyos in 06-16706, Laurette Justman in 06-16706, Candace Owens in 06-16706, Patty Hansen in 06-16706, Christine Rhodes in 06-16706, Linda Haught Ortega in 06-16706, Dixie Mundy in 06-16706, Brad Nelson in 0616706, Karen Osborne in 06-16706, Yvonne Pearson in 06-16706, Penny Pew in 06-16706, Helen Purcell in 06-16706, F. Ann Rodriguez in 06-16706's 43 pages brief, 1 Suppl Exc. vols; served on

		12/20/06 [06-16521, 06-16702, 06-16706] (BJB)
12/26/2006	32	Filed original and 15 copies Appellee Jan Brewer in 06-16702, Appellee Shelly Baker in 06-16702, Appellee Berta Manuz in 06-16702, Appellee Lynn Constable in 06-16702, Appellee Kelly Dastrup in 06-16702, Appellee Laura Dean-Lytle in 06-16702, Appellee Judy Dickerson in 06-16702, Appellee Donna Hale in 06-16702, Appellee Susan Hightower Marlar in 06-16702, Appellee Gilberto Hoyos in 06-16702, Appellee Laurette Justman in 06-16702, Appellee Christine Rhodes in 06-16702, Appellee Linda Haught Ortega in 06-16702, Appellee Dixie Mundy in 06-16702, Appellee Brad Nelson in 06-16702, Appellee Karen Osborne in 06-16702, Appellee Yvonne Pearson in 06-16702, Appellee Penny Pew in 06-16702, Appellee Helen Purcell in 06-16702, Appellee F. Ann Rodriguez in 06-16702, Appellee Jan Brewer in 06-16706, Appellee Shelly Baker in 06-16706, Appellee Berta Manuz in 06-16706, Appellee Lynn Constable in 06-16706, Appellee Kelly Dastrup in 06-16706, Appellee Laura Dean-Lytle in 06-16706, Appellee Judy Dickerson in 06-16706, Appellee Donna Hale in

		06-16706, Appellee Susan Hightower Marlar in 06-16706, Appellee Gilberto Hoyos in 06-16706, Appellee Laurette Justman in 06-16706, Appellee Christine Rhodes in 06-16706, Appellee Linda Haught Ortega in 06-16706, Appellee Dixie Mundy in 06-16706, Appellee Brad Nelson in 06-16706, Appellee Karen Osborne in 06-16706, Appellee Yvonne Pearson in 06-16706, Appellee Penny Pew in 06-16706, Appellee Helen Purcell in 06-16706, Appellee F. Ann Rodriguez in 06-16706 response to the Brennen [sic] Center amicus curiae brf of 17 pages, served on 12/22/06 [06-16521, 06-16702, 06-16706] (BJB)
12/26/2006	34	Filed original and 15 copies Appellee State of Arizona in 06-16702, Appellee Jan Brewer in 06-16702, Appellee State of Arizona in 06-16706, Appellee Jan Brewer in 06-16706 response to the Brennan Centers Amicus Curiae 1 Brief of 7 pages, served on 12/22/06 [06-16521, 06-16702, 06-16706] (BJB)
12/28/2006	37	Filed original and 15 copies appellee Maria M. Gonzalez in 06-16521's 16 pages brief, 0 Exc. vols: ; served on 12/27/06 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)

12/29/2006	38	Received Amicus Randall Pullen in 06-16702, Amicus Yes on Proposition in 06-16702, Amicus Randall Pullen in 06-16706, Amicus Yes on Proposition in 06-16706's brief in 15 copies of 16 pages; deficient: motion pending; served on 12/27/06 (PANEL) 06-16521, 06-16702, 06-16706] (BJB)
01/04/2007	42	Filed original and 15 copies Maria M. Gonzalez in 06-16702, Jesus Gonzalez in 06-16702, The Inter Tribal in 06-16706 reply brief, (Informal: no) 33 pages; served on 1/3/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
01/04/2007	45	Filed Amicus Protect Arizona Now in 06-16521, Amicus Trent Franks in 06-16521, Amicus Allied Educational in 06-16521, Amicus Washington Legal in 06-16521, Amicus Protect Arizona Now in 06-16702, Amicus Trent Franks in 06-16702, Amicus Allied Educational in 06-16702, Amicus Washington Legal in 06-16702, Amicus Protect Arizona Now in 06-16706, Amicus Trent Franks in 06-16706, Amicus Allied Educational in 06-16706, Amicus Washington Legal in 06-16706's motion to become amicus curiae served on 1/3/07 (PANEL) [6051252] (BJB)

01/05/2007	47	[orig recv'd] Filed The Inter Tribal in 06-16521, The Inter Tribal in 06-16702, The Inter Tribal in 06-16706 additional served on 1/5/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
01/05/2007	48	(orig recv'd) Filed State of Arizona et al's additional citations, served on 1/5/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
01/05/2007	52	Filed original and 15 copies Yes on Prop 200 in 06-16521 reply brief, (Informal: no) 10 pages; served on 1/4/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
01/08/2007	50	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, John T. NOONAN, George P. Schiavelli [06-16521, 06-16702, 06-16706] (JC)
01/29/2007	57	Filed The Inter Tribal's additional citations; served on 1/26/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
02/16/2007	58	Filed plaintiffs additional citations, served on 2/15/07 (PANEL) [06-16521, 06-16702, 06-16706] (BJB)
02/16/2007	59	Received from district court documents labeled witness & exhibit lists documents 265-273. (sent to MMS) [06-16521, 06-16702, 06-16706] (BJB)

04/20/2007	62	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Mary M. SCHROEDER, author; John T. NOONAN; George P. Schiavelli.) FILED AND ENTERED JUDGMENT. [06-16521, 06-16702, 06-16706] (CW)
05/18/2007	63	MANDATE ISSUED [06-16521, 06-16702, 06-16706] (BJB)
09/25/2007	64	RECORD RETURNED. (See control card for details.) (JAS)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 08-17094

09/24/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: Yes. The schedule is set as follows: CADS due by Attorney Nina Pereles, Attorney due on 09/16/2008. Designation of RT for Appellant Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project due 09/26/2008. Designation of RT for Appellee Shelly Baker, Jan Brewer, Lynn Constable, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Gilberto Hoyos, Laurette Justman, Berta Manuz, Susan Hightower Marlar, Dixie Mundy, Brad Nelson, Linda Haught Ortega, Karen Osborne, Candace Owens, Yvonne Pearson, Penny Pew, Helen Purcell, Christine Rhodes, F. Ann Rodriguez, State of Arizona and Yes on Proposition 200 due 10/06/2008, Transcript order for Appellant Bernie Abeytia,

Appellant Arizona Hispanic Community Forum, Appellant Chicanos Por La Causa, Appellant Valle Del Sol, Appellant Friendly House, Appellant Jesus Gonzalez, Appellant Debbie Lopez, Appellant Project Vote and Appellant Southwest Voter Registration Education Project due 10/16/2008. Transcript due for Court Reporter Laurie Adams, Court Reporter, Court Reporter Elaine Cropper, Court Reporter, Court Reporter David Lee, Court Reporter and Court Reporter Linda Schroeder-Willis, Court Reporter on 11/17/2008. Certificate of record due 10/23/2008. Appellant Bernie Abeytia, Appellant Arizona Hispanic Community Forum, Appellant Chicanos Por La Causa, Appellant Valle Del Sol, Appellant Friendly House, Appellant Jesus Gonzalez, Appellant Debbie Lopez, Appellant Project Vote and Appellant Southwest Voter Registration Education Project opening brief due 01/02/2009. Appellee Shelly Baker, Appellee Jan Brewer, Appellee Lynn Constable, Appellee Kelly Dastrup, Appellee Laura Dean-Lytle, Appellee Judy Dickerson, Appellee Donna Hale, Appellee Patty Hansen, Appellee Gilberto Hoyos, Appellee Laurette

		Justman, Appellee Berta Manuz, Appellee Susan Hightower Marlar, Appellee Dixie Mundy, Appellee Brad Nelson, Appellee Linda Haught Ortega, Appellee Karen Osborne, Appellee Candace Owens, Appellee Yvonne Pearson, Appellee Penny Pew, Appellee Helen Purcell, Appellee Christine Rhodes, Appellee F. Ann Rodriguez, Appellee State of Arizona and Appellee Yes on Proposition 200 answering brief due 02/02/2009. Appellant's optional reply brief is due 14 days after service of the answering brief. (GR)
10/01/2008	2	Filed Appellants' Civil Appeals Docketing Statement. Served on 09/30/2008. (NEW)
10/22/2008	3	Filed Appellee State of Arizona and Arizona Secretary of State motion to consolidate appeals. Served on 10/21/2008. [08-17094, 08-17115] (MT)
10/31/2008	4	Filed (ECF) – Maria M. Gonzalez and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094, – Bernie Abeytia,

		Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Maria M. Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17115 response opposing motion (Appellee Motion to consolidate cases). Date of service: 10/31/2008. [6693010] [08-17094, 08-17115] (NP)
01/06/2009	13	Filed Appellant's Inter Tribal Council of Arizona et al.'s excerpts of record in 2 volumes. Served on 01/05/2008 [08-17115, 08-17094] (WP)
01/07/2009	11	Submitted (ECF) Opening brief for review. Submitted by Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115. Date of service: 01/05/2009. [6759254] [08-17115, 08-17094] (KH)
01/07/2009	12	Filed Opening Brief [11] filed by The Inter Tribal Council of Arizona, Inc., Hopi Tribe, Arizona Advocacy Network, League of United Latin American Citizens Arizona, Steve M. Gallardo and

		League of Women Voters of Arizona in 08-17115. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification that the brief is identical to the version submitted electronically. [08-17094, 08-17115] (LA)
01/21/2009	15	Submitted (ECF) Opening brief for review. Submitted by – Maria M. Gonzalez, People For the American Way Foundation and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094, – Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Maria M. Gonzalez, Debbie Lopez, People For the American Way Foundation, Project Vote and Southwest Voter Registration Education Project in 08-17115. Date of service: 01/20/2009. [6776880] [08-17094, 08-17115] (NP)
01/26/2009	26	Received Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La

		Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094 excerpts of record in 5 volumes. No service date. (Brf not yet filed bc mtn pending) [08-17094, 08-17115] (LA)
01/27/2009	21	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by The League of Women Voters of the United States. Date of service: 01/27/2009. [6786861] [08-17094, 08-17115] (KNB)
01/28/2009	22	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by National Association of Latino Elected and Appointed Officials Educational Fund. Date of service: 01/28/2009. [6787386] [08-17094, 08-17115] (CAK)
01/29/2009	25	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Members of Congress. Date of service: 01/29/2009. [6788702] [08-17094, 08-17115] (BDN)
01/30/2009	34	Received 10 paper copies of Amicus brief [21] filed by The League of Women Voters of the United States.

		One copy to Case Files, the remainder to Records. [08-17094, 08-17115] (LA)
02/03/2009	31	Submitted (ECF) Answering brief for review. Submitted by Appellees Jan Brewer and State of Arizona in 08-17115, 08-17094. Date of service: 02/03/2009. [6794207] [08-17115, 08-17094] (BAB)
02/04/2009	38	Filed Appellees Jan Brewer and State of Arizona supplemental excerpts of record on appeal in 1 volume. Served 2/2/09. [08-17094, 08-17115] (LA)
02/11/2009	36	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Mountain States Legal Foundation. Date of service: 02/11/2009. [6804750] [08-17115, 08-17094] (JS)
02/20/2009	39	Submitted (ECF) Reply brief for review. Submitted by Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115. Date of service: 02/20/2009. [6815793] [08-17115, 08-17094] (KH)
03/19/2009	48	Filed (ECF) Appellees Patty Hansen and Candace Owens

		in 08-17094 Correspondence: Statement of Non-Participation in Briefing. Date of service: 03/19/2009 [6852696] [08-17094, 08-17115] (JEW)
03/23/2009	49	Submitted (ECF) Answering brief for review. Submitted by Appellees Jan Brewer and State of Arizona. Date of service: 03/23/2009. [6855813] (MO)
03/24/2009	52	Submitted (ECF) Answering brief for review. Submitted by Appellees Shelly Baker, Jan Brewer, Lynn Constable, Judy Dickerson, Donna Hale, Berta Manuz, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Helen Purcell, Christine Rhodes and F. Ann Rodriguez in 08-17094. Date of service: 03/23/2009. [6856681] [08-17094, 08-17115] (KER)
03/24/2009	56	Filed Appellees Jan Brewer and State of Arizona four supplemental excerpts of record on appeal in 1 volume. [08-17094, 08-17115] (GLS)
03/24/2009	58	Filed Appellees Shelly Baker, Lynn Constable, Judy Dickerson, Donna Hale, Berta Manuz, Dixie Mundy, Brad Nelson, Karen Osborne, Yvonne Pearson, Helen Purcell, Christine Rhodes and F. Ann Rodriguez four supplemental

		excerpts of record on appeal in 1 volume. [08-17094, 08-17115] (GLS)
03/27/2009	59	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by American Unity Legal Defense Fund, Inc.. Date of service: 03/27/2009. [6862035] [08-17094, 08-17115] (BWZ)
03/30/2009	61	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by American Unity Legal Defense Fund. Date of service: 03/27/2009. [6863255] [08-17094, 08-17115] (BWZ)
03/31/2009	65	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Evergreen Freedom Foundation. Date of service: 03/30/2009. [6864699] [08-17094, 08-17115] (MJR)
04/06/2009.	79	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Protect Arizona NOW, et al.. Date of service: 04/02/2009. [6873103] [08-17094, 08-17115] (RAS)
04/14/2009	83	Submitted (ECF) Reply brief for review and filed Motion to file a late brief. Submitted by – Maria

		M. Gonzalez and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094. Date of service: 04/14/2009. [6882920] [08-17094, 08-17115] (NP)
05/15/2009	87	Filed – Maria M. Gonzalez and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project four supplemental excerpts of record on appeal in 1 volume. [08-17094, 08-17115] (GLS)
05/26/2009	88	Filed certificate of record on appeal. RT filed in DC 9/15/06,7/11/08, 7/17/08, 7/22/08, 7/25/08 [08-17094, 08-17115] (MT)
08/17/2009	93	CALENDARED: 10/20/2009 10:00 AM Univeristy [sic] of Arizona @ Tucson, Ares Auditorium, Room 164 [7029963] [08-15905, 08-17094, 08-17115] (AM)
09/08/2009	94	Notice of Oral Argument on OCTOBER 20, 2009 at University of Arizona in Tucson, AZ. Please

		return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [7053986] [08-17094, 08-17115] (AM)
09/28/2009	95	Filed (ECF) – Maria M. Gonzalez, People For the American Way Foundation, Luciano Valencia and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094 citation of supplemental authorities. Date of service: 09/28/2009. [7077083] [0817094, 08-17115] (NP)
10/15/2009	96	Filed (ECF) Appellees Jan Brewer and State of Arizona in 08-17094, 08-17115 citation of supplemental authorities. Date of service: 10/15/2009. [7096144] [08-17094, 08-17115] (BAB)
10/20/2009	97	ARGUED AND SUBMITTED TO SANDRA DAY O'CONNOR, II, ALEX KOZINSKI and SANDRA S. IKUTA. [7102366] [08-17094, 08-17115] (AW)
10/26/2010	101	FILED OPINION (SANDRA DAY O'CONNOR, ALEX KOZINSKI and SANDRA S.

		IKUTA) AFFIRMED IN PART; REVERSED IN PART. Each party shall bear their own costs. Judge: AK Dissenting, Judge: SSI Authoring. FILED AND ENTERED JUDGMENT. [7522261] [08-17094, 08-17115] (RP)
11/05/2010	105	Filed (ECF) – Maria M. Gonzalez and Appellants Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project EMERGENCY Motion for injunction pending appeal. Date of service: 11/05/2010. [7537501] (NP)
11/08/2010	106	Filed order (SANDRA DAY O'CONNOR, ALEX KOZINSKI and SANDRA S. IKUTA) Appellees shall file a response to appellantsä€™ [sic] emergency motion, not exceeding 8,000 words, by 5:00 p.m., Pacific time, on November 9, 2010. Appellants may file a reply, not exceeding 4,000 words, by 5:00 p.m., Pacific time, on November 10, 2010. The parties need not file paper copies. See Fed. R. App. P. 27(d)(3). [7537678] (KKW)
11/09/2010	112	Filed (ECF) Appellees Shelly Baker, Jan Brewer, Lynn Constable, Kelly Dastrup, Laura Dean-Lytle,

Judy Dickerson, Donna Hale, Patty Hansen, Gilberto Hoyos, Laurette Justman, Berta Manuz, Susan Hightower Mader, Dixie Mundy, Brad Nelson, Linda Haught Ortega, Karen Osborne, Candace Owens, Yvonne Pearson, Penny Pew, Helen Purcell, Christine Rhodes, F. Ann Rodriguez and State of Arizona in 0817094, 08-17115 response to motion (,motion for injunction pending appeal,, to set response by any party to anything). Date of service: 11/09/2010. [7541256] [08-17094, 08-17115] (CJB)

11/10/2010 113 Filed (ECF) – Maria M. Gonzalez and Appellants Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos For La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Debbie Lopez, Project Vote and Southwest Voter Registration Education Project in 08-17094, – Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Valle Del Sol, Friendly House, Jesus Gonzalez, Maria M. Gonzalez, Debbie Lopez, People For the American Way Foundation, Project Vote, Southwest Voter Registration Education Project and Luciano Valencia in 08-17115 reply to response ( ). Date of service:

		11/10/2010. [7543044] [08-17094, 08-17115] (NP)
11/11/2010	114	Filed order (SANDRA DAY O'CONNOR, ALEX KOZINSKI and SANDRA S. IKUTA) Denying Motion (ECF Filing) emergency motion for injunction pending appeal filed by Appellants Arizona Hispanic Community Forum, Friendly House, Southwest Voter Registration Education Project, Valle Del Sol, Debbie Lopez, Chicanos For La Causa, Project Vote and Maria M. Gonzalez in 08-17094 [7543098] [08-17094, 0817115] (phoned & faxed) (MD)
11/16/2010	117	Filed (ECF) Appellees Jan Brewer and State of Arizona in 08-17094 petition for rehearing en banc (from 10/26/2010 opinion). Date of service: 11/16/2010. [7547835] [08-17094, 08-17115] (CJB)
11/23/2010	123	Filed (ECF) Amicus Curiae Mountain States Legal Foundation in 08-17115 Correspondence: Letter of Amicus Curiae, Mountain States Legal Foundation, in support of Petition for Rehearing En Banc. Date of service: 11/23/2010 [7556152] [08-17094, 08-17115] (JS)
11/26/2010	128	Filed clerk order: The amicus brief [124] submitted by American Unity Legal Defense on 11/23/10 is filed.

		No paper copies of this brief are required. [7558648] [08-17094, 08-17115] (LC)
11/26/2010	129	Filed clerk order: The amicus brief [127] submitted by Allied Educational Foundation, Protect Arizona Now, and Wshington Legal Foundation (WLF) on 11/24/10 is filed. No paper copies of this brief are required. [7558653] [08-17094, 08-17115] (LC)
11/26/2010	134	Filed clerk order: The amicus brief [131] submitted by Immigration Reform Law Institute on 11/26/10 is filed. No paper copies of this brief are required. [7559098] [08-17094, 08-17115] (LC)
12/10/2010	135	Filed order (SANDRA DAY O'CONNOR, ALEX KOZINSKI and SANDRA S. IKUTA) Appellants are directed to file a response to the Petition for Rehearing En Banc filed with this court on November 16, 2010. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the responses electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7575730] [08-17094, 08-17115] (KKW)

12/20/2010	140	Filed (ECF) – Maria M. Gonzalez in 08-17094 response to ,to [sic] set response by any party to anything, for rehearing by en banc only (all active, any interested senior judges). Date of service: 12/20/2010. [7585876]. [08-17094, 08-17115] (NP)
12/23/2010	141	Filed (ECF) – Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation and The Inter Tribal Council of Arizona, Inc. in 08-17094, – People For the American Way Foundation and Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115 Motion to extend time to file response to the Petition for Rehearing En Banc until 01/31/2011 at 11 pm. Date of service: 12/23/2010. [7590576] [08-17094, 08-17115] – [COURT UPDATE: Edited docket text to reflect the content of the filing. Resent NDA. 12/23/2010 by DB] (JMG)

12/28/2010	142	Filed order (SANDRA DAY O'CONNOR, ALEX KOZINSKI and SANDRA S. IKUTA) The motion of Appellants Inter Tribal Council of Arizona, et al. for an extension of time to file a response to the Petition for Rehearing En Banc is GRANTED. The response shall be filed no later than January 31, 2011. [7593548] [08-17094, 08-17115] (KKW)
01/31/2011	143	Filed (ECF) – Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona, People For the American Way Foundation and The Inter Tribal Council of Arizona, Inc. in 08-17094, – People For the American Way Foundation and Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115 response to ,for rehearing by en banc only (all active, any interested senior judges). Date of service: 01/31/2011. [7630293]. [08-17094, 08-17115] (JMG)
02/10/2011	144	Submitted (ECF) Amicus brief for review (by government or with

		consent per FRAP 29(a)). Submitted by The League of Women Voters of the United States. Date of service: 02/10/2011. [7643834] [08-17094, 08-17115] (MBD)
02/10/2011	145	Filed clerk order: The amicus brief [144] submitted by League of United Latin American Citizens Arizonaon [sic] 2/10/2011 is filed. No paper copies of this brief are required. [7644439] [08-17094, 08-17115] (LC)
04/27/2011	146	Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. [7731222] [08-17094, 08-17115] – [Edited: NDA regenerated due to caption correction. 04/29/2011 by RY] (RP)
04/28/2011	147	Filed order (ALEX KOZINSKI) En banc oral argument will take place during the week of June 20, 2011, in Pasadena, California. The date and time will be determined by separate order. For further information or special requests regarding scheduling, please contact Deputy Clerk Paul Keller at paul_keller@ca9.uscourts.gov or

		(415) 355-8026. Within seven days from the date of this order, the parties shall forward to the Clerk of the Court twenty-five additional paper copies of the original briefs and excerpts of record. [7732769] [08-17094, 08-17115] – [Edited: NDA regenerated due to caption correction. 04/29/2011 by RY] (KKW)
06/01/2011	168	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Asian American Legal Defense and Education Fund. Date of service: 06/01/2011. [7770228] [08-17094, 08-17115] – [COURT UPDATE: Replaced PDF of Motion and Brief (to correct footnote font size.) Resent NDA. 06/02/2011 by DB] (AR)
06/03/2011	170	Filed order (ALEX KOZINSKI) The Asian American Legal Defense and Education Fundâ€™s [sic] motion for leave to file an amicus brief is granted, and the Clerk is ordered to file the brief it submitted with its motion. [7773279] [08-17094, 08-17115] (KKW)
06/03/2011	171	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by United States. Date of service: 06/03/2011. [7773540] [08-17094, 08-17115] (EHF)

06/03/2011	172	Filed clerk order: The amicus brief [168] submitted by Asian American Legal Defense and Education Fund in on 6/1/2011 is filed. Within 7 days of the filing of this order, filer is ordered to file 25 copies of the brief in paper format, with a green cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7773552] [08-17094, 08-17115] (LC)
06/03/2011	173	Entered appearance of Amicus Curiae USA . [7773573] [08-17094, 08-17115] (LC)
06/03/2011	174	Filed (ECF) Amicus Curiae USA in 08-17115 Motion to file a late brief. Date of service: 06/03/2011. [7773667] [08-17094. 08-17115] (EHF)
06/06/2011	176	Filed order (ALEX KOZINSKI) The Clerk shall file the United Statesâ€™s [sic] late-filed amicus brief. See 9th Cir. R. 29-2(e)(2). [7774516] [08-17094, 08-17115] (KKW)
06/06/2011	178	Filed clerk order: The amicus brief [171] submitted by USA on 6/3/2011 is filed. Within 7 days of the filing of this order, filer is ordered to file 25 copies of the brief in paper format, with a green cover, accompanied by certification, attached to the end of each copy of the brief, that the

brief is identical to the version submitted electronically. [7774784] [08-17094, 08-17115] (LC)

06/13/2011 190 Filed (ECF) – Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17094, Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115 reply to response () Date of service: 06/13/2011. [7782409] [08-17094, 08-17115] (JMG)

06/13/2011 191 Received 25 copies of amicus brief filed 2/11/2009 by Amicus Curiae Mountain States Legal Foundation. (EN BANC PANEL) [08-17094, 08-17115] (LC)

06/17/2011 204 Filed clerk order: The supplemental/ responss [sic] brief [199], [199], [199] submitted by Ken Bennett and State of Arizona is filed. Per 6/17/2011order, appellees shall submit 25 paper copies of this brief no later than noon PST on Monday, June 20, 2011â€" [sic] submit those paper copies to the Richard H. Chambers Courthouse,

		Attention Eve Fisher, 125 South Grand Avenue, Pasadena, California 91105. See 9th Cir. R. 31-1. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. A sample certificate is available at http://www.ca9.uscourts.gov/datastore/uploads/cmecf/Certificate-for-Brief-in-Paper-Format.pdf. The paper briefs must not be printed copies of the filed documents and shall not carry the CM/ECF imprint at the top of the page [7789812] [08-17094, 08-17115] (LC)
06/21/2011	205	ARGUED AND SUBMITTED TO ALEX KOZINSKI, HARRY PREGERSON, PAMELA ANN RYMER, SUSAN P. GRABER, MARSHA S. BERZON, JOHNNIE B. RAWLINSON, RICHARD R. CLIFTON, JAY S. BYBEE, SANDRA S. IKUTA, N. RANDY SMITH and MARY H. MURGUIA. [7793307] [08-17094, 08-17115] (LN)
04/17/2012	212	FILED OPINION (ALEX KOZINSKI, HARRY PREGERSON, PAMELA ANN RYMER, SUSAN P. GRABER, MARSHA S. BERZON, JOHNNIE B. RAWLINSON, RICHARD R. CLIFTON, JAY S. BYBEE,

SANDRA S. IKUTA, N. RANDY SMITH and MARY H. MURGUIA) AFFIRMED IN PART; REVERSED IN PART. Each party shall bear its own costs on appeal. Opinion by Judge Ikuta; Concurrence by Chief Judge Kozinski; Concurrence by Judge Berzon; Partial Concurrence and Partial Dissent by Judge Pregerson; Partial Concurrence and Partial Dissent by Judge Rawlinson. FILED AND ENTERED JUDGMENT. [8142804] [08-17094, 08-17115] (RP)

04/24/2012 213 Filed (ECF) Appellees Ken Bennett, Lynn Constable, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Gilberto Hoyos, Laurette Justman, Berta Manuz, Susan Hightower Marlar, Dixie Mundy, Brad Nelson, Linda Naught Ortega, Karen Osborne, Candace Owens, Yvonne Pearson, Penny Pew, Helen Purcell, Christine Rhodes, F. Ann Rodriguez and State of Arizona in 08-17094, Appellees Shelly Baker, Ken Bennett, Lynn Constable, Kelly Dastrup, Laura Dean-Lytle, Judy Dickerson, Donna Hale, Patty Hansen, Gilberto Hoyos, Laurette Justman, Berta Manuz, Susan Hightower Marlar, Dixie Mundy, Brad Nelson, Linda Haught Ortega, Karen Osborne, Candace Owens, Yvonne Pearson,

		Penny Pew, Helen Purcell and State of Arizona in 08-17115 Motion to stay the mandate. Date of service: 04/24/2012. [8152078] [08-17094, 08-17115] (TMC)
05/04/2012	218	Filed (ECF) Appellants Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17115, – Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Latin American Citizens Arizona, League of Women Voters of Arizona and The Inter Tribal Council of Arizona, Inc. in 08-17094 response opposing motion (,motion to stay the mandate). Date of service: 05/04/2012. [8166221] [08-17115, 08-17094] (RAK)
05/15/2012	219	Filed (ECF) Appellees Ken Bennett and State of Arizona in 08-17094, 08-17115 reply to response (, ,motion to stay the mandate). Date of service: 05/15/2012. [8179588] [08-17094, 08-17115] (TMC)
06/07/2012	232	Filed order (ALEX KOZINSKI, HARRY PREGERSON, PAMELA ANN RYMER, SUSAN P. GRABER, MARSHA S. BERZON, JOHNNIE B. RAWLINSON, RICHARD R. CLIFTON, JAY S.

BYBEE, SANDRA S. IKUTA, N. RANDY SMITH and MARY H. MURGUIA) The State of Arizona moves to stay the mandate for a period of 90 days pending the filing of its petition for certiorari. . . . Accordingly, because Arizona has not demonstrated a reasonable probability that the Supreme Court will grant certiorari or a reasonable possibility that the Supreme Court would reverse, and because the equities do not weigh in favor of granting a stay, we conclude that Arizona has not made an adequate showing of â€cegood [sic] causeâ€□ [sic] under Rule 41(d)(2)(A). We therefore exercise our discretion to deny the stay. As always, Arizona is free to renew its motion for a stay before the Supreme Court. See 28 U.S.C. Â [sic] § 2101(f); Sup. Ct. R. 23. DENIED. Chief Judge Kozinski and Judges Rawlinson and N.R. Smith voted to grant the stay. . [8205325] [08-17094, 08-17115] (KKW)

06/14/2012 233 Received Supreme Court order dated 06/14/2012. Upon Consideration of the application of counsel for the applicants, It Is Ordered that the mandate of the United States Court of Appeals for the Ninth Circuit, case Nos. 08-17094 &

		08-17115, is hereby stayed pending receipt of a response, due on or before Monday, June 18,2012 by 5 p.m., and further order of the undersigned or of the Court. The reply brief, if any, is to be filed by 12 noon, Wednesday, June 20,2012. Supreme Court No: 11A1189. [8214742] [08-17094, 08-17115] (RR)
06/28/2012	235	Received Supreme Court order dated 06/28/2012. The application for stay presented to Justice Kennedy and by him referred to the Court is denied. The order heretofore entered by Justice Kennedy is vacated. Justice Alito would grant the application for stay. Supreme Court No: 11A1189. [8231487] [08-17094, 08-17115] (RR)
06/29/2012	236	MANDATE ISSUED.(AK, HP, PAR, SPG, MSB, JBR, RRC, JSB, SSI, NRS and MHM) [8232741] [08-17094, 08-17115] (RR)
07/23/2012	237	Received notice from the Supreme Court: petition for certiorari filed on 07/16/2012. Supreme Court Number 12-71. [8259097] [08-17094, 08-17115] (RR)
10/19/2012	238	Received Supreme Court order dated 10/15/2012. The motion of Mountain States Legal Foundation for leave to file a brief as amicus is granted. The petition for a writ

of certiorari is granted. Supreme Court No: 12-71. [8369930] [08-17094, 08-17115] (RR)

Office of the Secretary of State [SEAL]
State Capitol, West Wing, 1700 West Washington,
Phoenix, Arizona 85007-2808
Telephone: (602) 542-4285 or
Fax: (602) 542-1575 or 542-6172

July 18, 2001

Mr. Rick Cunnington
981 West Graythorn Place
Oro Valley, AZ 85737

Dear Mr. Cunnington:

Your letter has been referred to me for a response to your question about what is done by county recorders to deter non-citizens from registering to vote. The National Voter Registration Act of 1993 prohibits the states from requiring people who are registered to vote to prove that they are United States Citizens.

This office, in conjunction with the county recorders, re-designed the voter registration form to make it clear that falsely signing the form is a class 5 felony. The new form also asks the potential voters to check a box if they are a US Citizen and informs them that if they check the "No" box, they should not complete the form. These instructions are also in the Spanish language.

If it comes to the attention of the county recorders or this office that someone has fraudulently registered, the matter is referred to the county attorney where the registration occurred. There have been a [sic] some

prosecutions for false registration, which have resulted in convictions.

Federal law requires that a non-citizen must be deported for registering to vote. It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.

Thank you for your question and interest in the voter registration process.

Very truly yours,

/s/ Jessica Funkhouser
JESSICA FUNKHOUSER
State Election Director

Exhibit: 40
Name: Kanefield
Date: 7-25-06
Meri Coash CCR, RMR

ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT ("PROPOSITION 200"), BALLOT MEASURE, JULY 1, 2004

AN INITIATIVE MEASURE

AMENDING SECTIONS 16-152, 16-166 AND 16-579, ARIZONA REVISED STATUTES; AMENDING TITLE 46, CHAPTER 1, ARTICLE 3, ARIZONA REVISED STATUTES, BY ADDING SECTION 46-140.01; RELATING TO THE ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT.

Be it enacted by the People of the State of Arizona:

Section 1. *Short title*

This act may be cited as the "Arizona Taxpayer and Citizen Protection Act".

Sec. 2. *Findings and declaration*

This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to

cooperate with federal immigration authorities to discourage illegal immigration.

Sec. 3. Section 16-152, Arizona Revised Statutes, is amended to read:

16-152. *Registration form*

A. The form used for the registration of electors shall contain:

1. The date the registrant signed the form.

2. The given name of the registrant, middle name, if any, and surname.

3. Complete address of actual place of residence, including street name and number, apartment or space number, city or town and zip code, or such description of the location of the residence that it can be readily ascertained or identified.

4. Complete mailing address, if different from residence address, including post office address, city or town, zip code or other designation used by the registrant for receiving mail.

5. Party preference.

6. Telephone number, unless unlisted.

7. State or country of birth.

8. Date of birth.

9. Occupation.

10. Indian census number (optional to registrant).

11. Father's name or mother's maiden name.

12. The last four digits of the registrant's social security number (optional to registrant).

13. A statement as to whether or not the registrant is currently registered in another state, county or precinct, and if so, the name, address, county and state of previous registration.

14. A statement that the registrant is a citizen of the United States.

15. A statement that the registrant will be eighteen years of age on or before the date of the next general election.

16. A statement that the registrant has not been convicted of treason or a felony, or if so, that the registrant's civil rights have been restored.

17. A statement that the registrant is a resident of this state and of the county in which the registrant is registering.

18. A statement that executing a false registration is a class 6 felony.

19. The signature of the registrant.

20. If the registrant is unable to sign the form, a statement that the affidavit was

completed according to the registrant's direction.

21. A statement that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes.

22. A statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

23. A STATEMENT THAT THE APPLICANT SHALL SUBMIT EVIDENCE OF UNITED STATES CITIZENSHIP WITH THE APPLICATION AND THAT THE REGISTRAR SHALL REJECT THE APPLICATION IF NO EVIDENCE OF CITIZENSHIP IS ATTACHED.

B. A duplicate voter receipt shall be provided with the form that provides space for the name, street address and city of residence of the applicant, party preference and the date of signing. The voter receipt is evidence of valid registration for the purpose of casting a ballot to be verified as prescribed in section 16-584, subsection B.

C. The state voter registration form shall be printed in a form prescribed by the secretary of state.

D. The county recorder may establish procedures to verify whether a registrant has successfully petitioned the court for an injunction

against harassment pursuant to section 12-1809 or an order of protection pursuant to section ~~12-1810 or~~ 13-3602 and, if verified, to protect the registrant's residence address, telephone number or voting precinct number, if appropriate, from public disclosure.

Sec. 4. Section 16-166, Arizona Revised Statutes, is amended to read:

16-166. *Verification of registration*

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears on the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by section 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the name of the elector will be removed from the general register and transferred to the inactive voter list.

B. If the elector provides the county recorder with a new registration form, the county recorder shall change the general register to reflect the

changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form to the county recorder of the county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify registrants whose addresses may have changed. If it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change

the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration information. If the registrant fails to return the form postmarked not later than twenty-nine days before the next election, the elector shall be removed from the general register and transferred to the inactive voter list. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. THE COUNTY RECORDER SHALL REJECT ANY APPLICATION FOR REGISTRATION THAT IS NOT ACCOMPANIED BY SATISFACTORY EVIDENCE OF UNITED STATES CITIZENSHIP. SATISFACTORY EVIDENCE OF CITIZENSHIP SHALL INCLUDE ANY OF THE FOLLOWING:

1. THE NUMBER OF THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE ISSUED AFTER OCTOBER 1, 1996 BY THE DEPARTMENT

OF TRANSPORTATION OR THE EQUIVALENT GOVERNMENTAL AGENCY OF ANOTHER STATE WITHIN THE UNITED STATES IF THE AGENCY INDICATES ON THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE THAT THE PERSON HAS PROVIDED SATISFACTORY PROOF OF UNITED STATES CITIZENSHIP.

2. A LEGIBLE PHOTOCOPY OF THE APPLICANT'S BIRTH CERTIFICATE THAT VERIFIES CITIZENSHIP TO THE SATISFACTION OF THE COUNTY RECORDER.

3. A LEGIBLE PHOTOCOPY OF PERTINENT PAGES OF THE APPLICANT'S UNITED STATES PASSPORT IDENTIFYING THE APPLICANT AND THE APPLICANT'S PASSPORT NUMBER OR PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES PASSPORT.

4. A PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES NATURALIZATION DOCUMENTS OR THE NUMBER OF THE CERTIFICATE OF NATURALIZATION. IF ONLY THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS PROVIDED, THE APPLICANT SHALL NOT BE INCLUDED IN THE REGISTRATION ROLLS UNTIL THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS VERIFIED WITH THE UNITED

STATES IMMIGRATION AND NATURALIZATION SERVICE BY THE COUNTY RECORDER.

5. OTHER DOCUMENTS OR METHODS OF PROOF THAT ARE ESTABLISHED PURSUANT TO THE IMMIGRATION REFORM AND CONTROL ACT OF 1986.

6. THE APPLICANT'S BUREAU OF INDIAN AFFAIRS CARD NUMBER, TRIBAL TREATY CARD NUMBER OR TRIBAL ENROLLMENT NUMBER.

G. NOTWITHSTANDING SUBSECTION F OF THIS SECTION, ANY PERSON WHO IS REGISTERED IN THIS STATE ON THE EFFECTIVE DATE OF THIS AMENDMENT TO THIS SECTION IS DEEMED TO HAVE PROVIDED SATISFACTORY EVIDENCE OF CITIZENSHIP AND SHALL NOT BE REQUIRED TO RESUBMIT EVIDENCE OF CITIZENSHIP UNLESS THE PERSON IS CHANGING VOTER REGISTRATION FROM ONE COUNTY TO ANOTHER.

H. FOR THE PURPOSES OF THIS SECTION, PROOF OF VOTER REGISTRATION FROM ANOTHER STATE OR COUNTY IS NOT SATISFACTORY EVIDENCE OF CITIZENSHIP.

I. A PERSON WHO MODIFIES VOTER REGISTRATION RECORDS WITH A NEW RESIDENCE BALLOT SHALL NOT BE REQUIRED TO SUBMIT EVIDENCE OF CITIZENSHIP. AFTER CITIZENSHIP HAS BEEN DEMONSTRATED TO THE COUNTY RECORDER, THE PERSON IS NOT REQUIRED TO RESUBMIT

SATISFACTORY EVIDENCE OF CITIZENSHIP IN THAT COUNTY.

J. AFTER A PERSON HAS SUBMITTED SATISFACTORY EVIDENCE OF CITIZENSHIP, THE COUNTY RECORDER SHALL INDICATE THIS INFORMATION IN THE PERSON'S PERMANENT VOTER FILE. AFTER TWO YEARS THE COUNTY RECORDER MAY DESTROY ALL DOCUMENTS THAT WERE SUBMITTED AS EVIDENCE OF CITIZENSHIP.

Sec. 5. Section 16-579, Arizona Revised Statutes, is amended to read:

16-579. *Procedure for obtaining ballot by elector*

A. Every qualified elector, before receiving his ballot, shall announce his name and place of residence in a clear, audible tone of voice to the election official in charge of the signature roster or present his name and residence in writing AND SHALL PRESENT ONE FORM OF IDENTIFICATION THAT BEARS THE NAME, ADDRESS AND PHOTOGRAPH OF THE ELECTOR OR TWO DIFFERENT FORMS OF IDENTIFICATION THAT BEAR THE NAME AND ADDRESS OF THE ELECTOR. If the name is found upon the precinct register by the election officer having charge thereof, or the qualified elector presents a certificate from the county recorder showing that he is entitled by law to vote in the precinct, the election official in charge of the signature roster shall repeat the name and the qualified elector shall be allowed within the voting area.

B. Any qualified elector who is listed as having applied for an early ballot but who states that he has not voted and will not vote an early ballot for this election or surrenders the early ballot to the precinct inspector on election day shall be allowed to vote pursuant to the procedure set forth in section 16-584.

C. Each qualified elector's name shall be numbered consecutively by the clerks, with the number upon the stub of the ballot delivered to him, and in the order of applications for ballots. The election judge having charge of the ballots shall also write his initials upon the stub and the number of the qualified elector as it appears upon the precinct register. The judge shall give the qualified elector only one ballot, and his name shall be immediately checked on the precinct register.

D. Each qualified elector shall sign his name in the signature roster prior to receiving his ballot, but an inspector or judge may sign the roster for an elector who is unable to sign because of physical disability, and in that event the name of the elector shall be written with red ink, and no attestation or other proof shall be necessary. The provisions of this subsection relating to signing the signature roster shall not apply to electors casting a ballot using early voting procedures.

E. A person offering to vote at a special district election for which no special district register has been supplied shall sign an affidavit stating his address and that he resides within the district boundaries or proposed district boundaries and

swearing that he is a qualified elector and has not already voted at the election being held.

Sec. 6. Title 46, chapter 1, article 3, Arizona Revised Statutes, is amended by adding section 46-140.01, to read:

46-140.01. *Verifying applicants for public benefits; violation; classification; citizen suits*

A. AN AGENCY OF THIS STATE AND ALL OF ITS POLITICAL SUBDIVISIONS, INCLUDING LOCAL GOVERNMENTS, THAT ARE RESPONSIBLE FOR THE ADMINISTRATION OF STATE AND LOCAL PUBLIC BENEFITS THAT ARE NOT FEDERALLY MANDATED SHALL DO ALL OF THE FOLLOWING:

1. VERIFY THE IDENTITY OF EACH APPLICANT FOR THOSE BENEFITS AND VERIFY THAT THE APPLICANT IS ELIGIBLE FOR BENEFITS AS PRESCRIBED BY THIS SECTION.

2. PROVIDE ANY OTHER EMPLOYEE OF THIS STATE OR ANY OF ITS POLITICAL SUBDIVISIONS WITH INFORMATION TO VERIFY THE IMMIGRATION STATUS OF ANY APPLICANT FOR THOSE BENEFITS AND ASSIST THE EMPLOYEE IN OBTAINING THAT INFORMATION FROM FEDERAL IMMIGRATION AUTHORITIES.

3. REFUSE TO ACCEPT ANY IDENTIFICATION CARD ISSUED BY THE STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE, INCLUDING A DRIVER LICENSE,

TO ESTABLISH IDENTITY OR DETERMINE ELIGIBILITY FOR THOSE BENEFITS UNLESS THE ISSUING AUTHORITY HAS VERIFIED THE IMMIGRATION STATUS OF THE APPLICANT.

4. REQUIRE ALL EMPLOYEES OF THE STATE AND ITS POLITICAL SUBDIVISIONS TO MAKE A WRITTEN REPORT TO FEDERAL IMMIGRATION AUTHORITIES FOR ANY VIOLATION OF FEDERAL IMMIGRATION LAW BY ANY APPLICANT FOR BENEFITS AND THAT IS DISCOVERED BY THE EMPLOYEE.

B. FAILURE TO REPORT DISCOVERED VIOLATIONS OF FEDERAL IMMIGRATION LAW BY AN EMPLOYEE IS A CLASS 2 MISDEMEANOR. IF THAT EMPLOYEE'S SUPERVISOR KNEW OF THE FAILURE TO REPORT AND FAILED TO DIRECT THE EMPLOYEE TO MAKE THE REPORT, THE SUPERVISOR IS GUILTY OF A CLASS 2 MISDEMEANOR.

C. THIS SECTION SHALL BE ENFORCED WITHOUT REGARD TO RACE, RELIGION, GENDER, ETHNICITY OR NATIONAL ORIGIN. ANY PERSON WHO IS A RESIDENT OF THIS STATE SHALL HAVE STANDING IN ANY COURT OF RECORD TO BRING SUIT AGAINST ANY AGENT OR AGENCY OF THIS STATE OR ITS POLITICAL SUBDIVISIONS TO REMEDY ANY VIOLATION OF ANY PROVISION OF THIS SECTION, INCLUDING AN ACTION FOR MANDAMUS. COURTS SHALL GIVE PREFERENCE TO ACTIONS BROUGHT UNDER

THIS SECTION OVER OTHER CIVIL ACTIONS OR PROCEEDING PENDING IN THE COURT.

Sec. 7. *Severability*

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
[SEAL] WASHINGTON, DC 20005
Tel: (202) 566-3100 www.eac.gov
Fax: (202) 566-3127 Toll free: 1 (866) 747-1471

March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.*, (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result

in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona's Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement

their Federal Registration Form would have their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied,* 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp 330, 351-355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections . . . or to 'alter' the laws initially promulgated by the states. Thus . . . article 1, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller*, 129 F.3d at 836.

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal

election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d F.3d [sic] 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission* pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.[1] The

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[1] The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.[2] These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some

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[2] These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C.§15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject

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[3] *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

only to HAVA's verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

/s/ Thomas R. Wilkey
Thomas R. Wilkey
Executive Director

[SEAL]
JAN BREWER
SECRETARY OF STATE
STATE OF ARIZONA
State Capitol, 1700 West Washington Street, 7th Floor
Phoenix, Arizona 85007-2888
Telephone (602) 542-4285 Fax (602) 542-1575

March 13, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue, N.W.
Washington, DC 20005

Dear Chairman DeGregorio,

As the Secretary of State and Chief Election Officer for the State of Arizona, I have significant concerns about the March 8, 2006, letter from your executive director asserting that Arizona may not implement its proof of citizenship law with respect to voters who register using a Federal Mail Voter Registration Form (Federal Form). In my mind, such a policy is completely inconsistent, unlawful, and without merit.

The executive director's opinion is incorrect and unlawfully prevents the State of Arizona from implementing an important voting security measure with respect to those voters using the Federal Form. Arizona's proof of citizenship requirement was passed by over one million voters in 2004, and was precleared by the U.S. Department of Justice (DOJ) on January 24, 2005. In addition, DOJ separately

pre-cleared our Arizona Voter Registration Form on May 6, 2005, which includes the proof of citizenship instructions now required of all citizens registering to vote in Arizona. The DOJ has civil enforcement power over the National Voter Registration Act, and has expressed no concern about Arizona's proof of citizenship requirement when registering to vote.

As I stated in my March 9, 2006, letter, I believe your letter provides questionable legal support for its conclusion. After consulting with the Arizona Attorney General, I will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).

As I requested of you in December. I urge you to instruct voters using the Federal Form to register in Arizona that they provide sufficient proof of citizenship. To do otherwise would be incredibly irresponsible and may unnecessarily disenfranchise voters using the Federal Form to register.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Arizona Secretary of State

JKB:kt

AFFIDAVIT OF JOSEPH KANEFIELD
STATE ELECTION DIRECTOR
ARIZONA SECRETARY OF STATE'S OFFICE

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JOSEPH KANEFIELD, upon his oath, states the following to be true:

1. I am currently employed by Secretary of State Janice K. Brewer as the State Election Director, and have served in this position since January 26, 2004.

2. The State of Arizona has used and accepted the Federal Mail Voter Registration Form (Federal Form) since the inception of the National Voter Registration Act on January 1, 1995, and continues to use and accept this form. This policy did not change after the passage of Proposition 200 at the General Election in 2004.

3. In order to process any voter registration application, the form must contain information required by state law. The required information as set forth in A.R.S. §§ 16-121.01 and -166(F), includes the applicant's name, residence address or location, date of birth, signature, a checkmark or other appropriate indicator that the person answered "yes" to the question regarding citizenship, and satisfactory evidence of citizenship.

4. The Secretary of State's Office makes the Federal Form available to anyone who requests it. To my knowledge, no individuals or groups have requested copies of the Federal Form from our office since I became State Election Director. The form is also available on the Election Assistance Commission's website, www.eac.gov, and can be easily printed or downloaded.

5. Military and overseas voters are instructed by the Election Assistance Commission not to register to vote using the Federal Form. Instead, the Election Assistance Commission instructs military and overseas voters in its general instructions for the Federal Form to use the Federal Postcard Application available to these citizens from military bases, American embassies, or consular offices.

6. The United States Department of Defense through its Federal Voting Assistance Program instructs Arizona military and overseas voters using the Federal Postcard Application to provide satisfactory evidence of citizenship with the form as required by A.R.S. § 16-166(F).

7. The Secretary of State's Office supplies governmental and private entities copies of the Arizona voter registration form upon request.

8. The county recorders are responsible for registering voters. The county recorders have authorized the Secretary of State's Office to receive completed registration forms from voters. Those forms are forwarded to the county recorders after they are received for processing.

9. The Secretary of State is the chief election officer responsible for coordinating the state responsibilities under the NVRA. These responsibilities initially focused on securing state legislation to implement the provisions of the NVRA.

10. The office's current responsibilities under the NVRA include prescribing the state voter registration form [A.R.S. § 16-152(C)], making available for distribution the federal voter registration form [A.R.S. § 16-151(B)], serving as the recipient of notices from the United States attorney regarding felony convictions in federal courts of any persons who claim residence in Arizona and notifying the county recorders of the convictions [42 U.S.C. 1973gg-6(g)], and submitting post-election reports to the Election Assistance Commission [A.R.S. § 16-151(B)].

11. Other responsibilities of the Secretary of State relating to the NVRA and the Help America Vote Act (HAVA) include receiving notifications from superior court and district court when a person is declared

incapacitated or convicted of a felony, and from the Arizona Department of Health Services when an Arizona resident over the age of sixteen has died. [A.R.S. § 16-165(C) and (D)]. This information is also passed on to the county recorders. The Secretary of State also coordinates with the Motor Vehicle Division (MVD) to match information from the statewide voter registration database with MVD's database as required by HAVA. [42 U.S.C. § 15483(a)(5)(B)(i)].

12. The Secretary of State's office also works with the Motor Vehicle Division and the Arizona Department of Economic Security to educate and coordinate those agencies' obligations to register voters under the NVRA.

13. On January 25, 2005, the day after the U.S. Department of Justice precleared the portions of Proposition 200 that affect voting, I sent an email to all county recorders and election directors with the following recommendations:

> For those registrations received after January 24, 2005, that do not contain satisfactory evidence of citizenship, it is our recommendation that a letter be sent to the registrants [by the county recorder] informing them of the steps that need to be taken to establish citizenship. This should be done in accordance

with the procedures currently in place under A.R.S. § 16-134(B), which requires the county recorders to notify registrants within 10 business days that the registration is incomplete and the registration cannot be completed until the information is supplied. The letter should list the documents set forth in A.R.S. § 16-166(F)(1)-(6).

14. The Secretary of State's Office has also made significant efforts to educate the public about the new requirements of Proposition 200. These efforts have included redesigning the state voter registration form to include clear instructions about the proof of citizenship requirement. The election officer certification training conducted by the Secretary of State's Office in 2005 in accordance with A.R.S. § 16-407 also included a component on Proposition 200 to educate the State's election officers about the new law. This office also issued press releases regarding the requirements of Proposition 200 and conducts outreach efforts around the state through our full-time voter outreach coordinator.

15. In addition to being able to register by mail or in-person, people in Arizona can register on-line. EZ Voter Registration (EZ Voter) is an online service to provide safe, convenient, accurate and real-time voter registration. Arizona is the *only*

state with true online electronic voter registration.

16. The EZ Voter program began in 2002, and is now the primary method by which all Arizonans register to vote.

17. In 2005, the EZ Voter system was further integrated with the Motor Vehicles Division ("MVD") system to enable citizens to automatically register to vote through their driver license applications. Over 2 million people who perform driver license transactions annually at MVD offices are offered the opportunity to register or revise their registrations through this process.

18. Since January 2005, over 50% of all applications for voter registration in Arizona were processed through EZ Voter.

19. People registering through EZ Voter comply with the proof of citizenship requirements of Proposition 200 by including the number of their driver licenses issued after October 1, 1996, which serves as proof of citizenship. Even prior to the passage of Proposition 200, a citizen had to have a valid driver license in order to register to vote using EZ Voter.

20. On April 7, 2005, I received an email from Laiza N. Otero at the Election Assistance Commission that requested any changes to the Arizona instructions for the federal form that may be necessary

as a result of changes to mailing address, registration deadline or eligibility requirements. In addition, on December 1, 2005, Kris Waite, Assistant Election Director, received an email from Edgardo Cortes, Election Research Specialist at the Election Assistance Commission, that included proposed Arizona instructions to the Federal Form that properly reflected the new proof of citizenship requirement set forth in Proposition 200. Mr. Edgardo's email asked Ms. Waite to "[p]lease review the text of the [proposed Arizona instructions], and let me know if any changes need to be made. I appreciate your prompt response so that we are able to provide the most accurate information to individuals using the National Form."

21. On December 12, 2005, Robert Flores, our Voter Outreach Coordinator, sent Mr. Edgardo the Arizona proposed instructions to the Federal Form, which made only slight grammatical and technical changes to the instructions proposed by Mr. Edgardo in his December 1, 2005, email to Kris Waite. The next communication from the EAC came three months later from its executive director, Thomas R. Wilkey, to Secretary of State Jan Brewer dated March 6, 2006, responding to our office's December 12, 2005 email to the EAC with proposed Arizona instructions to the Federal Form, and concluding in contrast to the

December 1, 2005 correspondence that Arizona may not condition acceptance of the Federal Form upon receipt of supplemental proof of citizenship.

22. The voter registration deadline for the September 12, 2006 primary election is August 14, 2006 at midnight and the voter registration deadline for the November 7, 2006 general election is October 9, 2006 at midnight.

23. The number of registered voters in Arizona as of March 1, 2006, is 2,624,559. This number is substantially higher than the comparable numbers as of March 1, 2004, which totaled 2,274,367. Based on this comparison, current registration rates as measured through EZ Voter, and a review of prior registration history, it is projected that voter registration in Arizona could top 3 million registered voters at the November 7, 2006 general election. Although registration numbers have fluctuated since the November 2, 2004 general election, this reflects continuing voter roll clean up efforts by the County Recorders. This process is done in accordance with the NVRA and state law and ensures that our voter registration data is up to date and complete.

/s/ Joseph Kanefield
JOSEPH KANEFIELD

SUBSCRIBED AND SWORN TO before me this 31st day of May, 2006.

[SEAL] OFFICIAL SEAL
E. ATKINSON
NOTARY PUBLIC ARIZONA
MARICOPA COUNTY
My Comm. Expires March 10, 2008

/s/ E. Atkinson
NOTARY PUBLIC

My Commission Expires:

[10 March 2008]

United States District Court,
D. Arizona.
Maria M. GONZALEZ, et al., Plaintiffs,
v.
State of ARIZONA, et al., Defendants.
No. CV 06-1268-PHX-ROS.

OPINION AND ORDER

In the general election of 2004, Arizona voters approved Proposition 200. That initiative made significant changes to Arizona's voter registration scheme. Plaintiffs challenge some of those changes as contrary to federal law and ask the Court to issue a temporary restraining order preventing Arizona officials from enforcing Proposition 200. Plaintiffs have not shown there is a likelihood they will succeed on the merits. Therefore, their request will be denied.

I. Background

Congress enacted the National Voter Registration Act ("NVRA") in 1993. 42 U.S.C. §§ 1973gg to 1973gg-10. The statute was passed to accomplish four goals:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b)(1)-(4). One of the methods Congress provided for achieving these purposes was allowing individuals to register to vote by mail. 42 U.S.C. § 1973gg-2(2). In the portion of the statute devoted to mail registration, Congress stated "[e]ach state shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant" to the specific criteria for that form set forth elsewhere.[1] 42 U.S.C. § 1973gg-4(a). Congress allowed states to "develop and use" their own mail voter registration forms, provided those forms also complied with certain criteria. 42 U.S.C. § 1973gg-4(a)(2). The criteria Congress envisioned for mail voter registration forms are set forth in 42 U.S.C. § 1973gg-7(b). That section provides, in relevant part:

> The mail voter registration form developed [by the Election Assistance Commission in conjunction with the States] –
>
> (1) may require only such identifying information (including the signature of the applicant) and other information (including

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[1] The Federal Election Commission's responsibilities regarding the mail voter registration form were later transferred to the Election Assistance Commission. 42 U.S.C. § 15532.

> data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. . . .
>
> 42 U.S.C. § 1973gg-7(b)(1). Prior to 2004, Arizona accepted and used the federal mail voter registration form and did not require those wishing to register to provide any proof of citizenship.

Arizona voters passed Proposition 200 in 2004. The initiative amended Arizona Revised Statutes section 16-166.[2] That statute now reads, in part, "[t]he county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." *Id.* The statute sets forth what qualifies as "satisfactory evidence of United States citizenship": "[t]he number of the applicant's driver license or nonoperating identification license, . . . [a] legible photocopy of the applicant's birth certificate, . . . [a] legible photocopy of . . . the applicant's United States passport, . . . [or][a] presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization." *Id.* Defendants claim that this law was precleared by the Department of Justice. (Response p. 4)

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[2] Proposition 200 made other changes to state law not relevant to the application for a temporary restraining order.

On March 6, 2006, the Executive Director of the Election Assistance Commission ("EAC") sent a letter to the Arizona Secretary of State expressing the opinion that Proposition 200's requirement regarding proof of citizenship violated the NVRA. (Exhibit 5) According to the letter, "[n]o state may condition acceptance of the Federal [Mail Voter Registration] Form upon receipt of additional proof. . . . Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." The Arizona Secretary of State responded to this letter and requested an "opportunity to respond to the legal points raised by [the Executive Director]." The Arizona Secretary of State also sent a letter to the Department of Justice asking that the EAC be advised that requiring individuals to provide proof of citizenship did not violate the NVRA.

On May 9, 2006, Plaintiffs filed their complaint setting forth ten causes of action.[3] (Doc. 1) That same day Plaintiffs filed a request for a temporary restraining order arguing that the NVRA preempted Proposition 200. Plaintiffs later sought more specific relief in the form of "an immediate order restraining and enjoining Defendants . . . from failing to distribute, use and accept the federal mail voter registration

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[3] Another action was consolidated with the current suit on June 1, 2006. (Doc. 28)

application form prescribed by the U.S. Election Assistance Commission." (Doc. 13) Thus, the main issue now before the Court is whether the NVRA's language regarding the federal mail voter registration form preempts Proposition 200's requirement that individuals present proof of citizenship at the time they attempt to register using the federal form.[4]

II. Legal Standards

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D. Cal. 1995). The Ninth Circuit has provided two sets of criteria for a court to use when evaluating a request for a temporary restraining order. First, "[u]nder the 'traditional' criteria, a plaintiff must show '(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir.2003) (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995)). Or second, a plaintiff must "demonstrate [] '*either* a

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[4] Plaintiffs explicitly state that the issue currently before the court is Arizona's refusal to accept the *federal* form. (Doc. p. 1 n. 1)

combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.'" *Id.* (quoting *Johnson*, 72 F.3d at 1430). These two ways of evaluating a plaintiff's request "represent 'extremes of a single continuum,' rather than two separate tests." *Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.2003) (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir.1999)). "Thus, the greater the relative hardship to [Plaintiffs] the less probability of success must be shown." *Earth Island*, 351 F.3d at 1298 (quoting *Clear Channel*, 340 F.3d at 813). Of course, if Plaintiffs' claims fail as a matter of law, no likelihood of success exists and the temporary restraining order cannot be issued. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 913 (9th Cir.1995) (affirming dissolution of preliminary injunction because claims failed as a matter of law).

II. Analysis

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). If the language of a statute is clear, a court "need not resort to either the agency's interpretations or the statute's legislative history." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081,

1092 (9th Cir.2006).[5] In fact, if "the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)). Accordingly, Plaintiffs' resort to legislative history and agency action is premature in that an ambiguity in the statute must first be established.[6] The text of the NVRA must be examined in detail to determine if an ambiguity exists.

As cited earlier, 42 U.S.C. § 1973gg-7(b), sets forth the requirements for the federal mail voter registration form. That statute details what the form *may* contain, what the form *must* contain, as well as what the form *must not* contain. The statute provides that the form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as

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[5] *See also Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *United States v. Gonzales,* 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history.").

[6] Plaintiffs do not devote a great deal of argument to establishing that an ambiguity exists. Instead, Plaintiffs believe that the terms of the NVRA *clearly* prohibit Proposition 200 and refer to legislative history to get there. But if the terms of the NVRA are clear, there is no need to resort to agency decisions and legislative history.

is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). The form must contain

> a statement that –
>
> (A) specifies each eligibility requirement (including citizenship);
>
> (B) contains an attestation that the applicant meets each such requirement; and
>
> (C) requires the signature of the applicant, under penalty of perjury.

42 U.S.C. § 1973gg(b)(2)(A)-(C). The form must also include statements setting forth the "penalties provided by law for submission of a false voter registration application" and that voter registration is confidential. 42 U.S.C. § 1973gg-7(b)(4). Finally, the form must not "include any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3).

Plaintiffs submit that this statutory language sets forth *all* the requirements a state may require of an individual wishing to register to vote. In Plaintiffs' view, once an individual has fully and accurately completed the federal mail registration form, he or she should be registered to vote; the state may not condition registration on any additional requirements or actions not specifically set forth in the statute. Plaintiffs also contend that the NVRA explicitly bars

states from requiring any type of "formal authentication," which they interpret to include a requirement regarding proof of citizenship. The text of the statute does not support these conclusions.

A. Statutory Construction of NVRA Requirements

Plaintiffs' first argument is that if an individual completes the federal form contemplated by the NVRA, Arizona must accept that form and register the person to vote. In other words, the federal form acts as a ceiling regarding the requirements to register to vote; any requirement not on the federal form violates the NVRA. Defendants counter that the NVRA actually acts as a floor, setting forth the requirements for completion of the federal form but leaving states free to impose additional requirements, so long as those requirements are not specifically barred by the NVRA. In other words, the full and accurate completion of the federal form does not assure an individual that they are registered to vote, additional information may be required. To resolve whether the NVRA requirements act as a ceiling or as a floor, the Court may look to the language of the NVRA addressing the contents of the federal form, "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

To begin, there is no indication in the language of the NVRA itself that states are prohibited from

requiring additional information, such as proof of citizenship, when processing voter registration forms. The NVRA provides that a voter registration form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to the previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). In Plaintiffs' view, the terms "identifying information" and "other information" are not sufficiently broad to encompass a requirement of proof of citizenship. This does not square with the plain meaning of such terms. The statute allows requiring "other information" meant to assist a state in "assess[ing] the eligibility of the applicant" to vote. The plain meaning is if the state deems some information necessary to identify the applicant, the information can be required. The state may require a signature, data relating to prior registration, and such other information that will enable the state to determine eligibility and to administer the registration and election process. Therefore, in the identification process the state is allowed to determine eligibility. Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose and goal is to increase registration of "eligible citizens." 42 U.S.C. § 1973gg(b)(1)-(2). Providing proof of citizenship undoubtedly assists Arizona in

assessing the eligibility of applicants. Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA.[7]

Further support for Defendants' position that the NVRA does not set out *all* of the requirements for registering to vote is that the NVRA recognizes that states may have to reject some submitted forms. Congress provided that states must "send notice to each applicant of the disposition of the application" to register to vote. 42 U.S.C. § 1973gg-6(a)(2). There is no indication from the statute itself what basis a state may have for rejecting an application, but such rejections are clearly contemplated. Arizona immediately sends notice to individuals who attempt to register to vote but fail to include information regarding their citizenship status. The possibility that a state will have to reject some registration forms is contemplated by the NVRA and supports Defendants' contention that completion of the federal form, simpliciter, may not be enough.

Another informative aspect of the NVRA is that it provides specific guidance regarding what *may not* be required: the federal form "may not include any requirement for notarization or other formal

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[7] The portion of the NVRA both parties refer to controls the contents of the federal form. 42 U.S.C. § 1973gg-7(b). Arguably, Proposition 200 does not change the contents of the form so 1973gg-7(b) does not apply. But changing what an individual must submit *in addition* to the federal form is at least within the spirit of the NVRA if not the letter.

authentication." 42 U.S.C. § 1973gg-7(b)(3). This is the only specific prohibition mentioned. Plaintiffs read this restriction as applying to Arizona's request for proof of citizenship. The plain language of this prohibition, however, rules out this argument.

The meaning of a statutory word or phrase, such as "other formal authentication," can be determined "by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). "[W]ords grouped in a list should be given related meaning," thus, "other formal authentication" should be given a meaning similar to that of "notarization." This interpretation is supported by resort to definitions of the two terms. *See* Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437 (1994) (detailing Supreme Court's reliance on dictionary definitions in statutory interpretation cases).

According to Black's Law Dictionary 1087 (8th ed. 2004), "notarize" means "to attest to the authenticity of (a signature, mark, etc.)." "Formal," on the other hand, is defined as "[p]ertaining to or following established procedural rules, customs, and practices. . . . Ceremonial," *id.* at 678, and "authentication" is defined as "the act of proving that something (as a document) is true or genuine." *Id.* at 142. Thus, "formal authentication" refers to a requirement similar to notarization, such as requiring a ceremonial act in which an individual attests to the truth of the registration form. A bar on notarization and formal authentication has no impact on a

requirement that an individual submit "other information" in any number of ways to prove citizenship. Proposition 200's citizenship verification requirements are aimed at proving voter eligibility, *not* at proving the registration form is "true or genuine." Therefore, the bar on "formal authentication" does not prevent an application of Proposition 200's requirements.

Connected to the finding that the NVRA's bar on notarization or other formal authentication does not apply to requiring proof of citizenship is the observation that Congress did not specifically bar any other type of information being required for registration. As recognized in *Key Tronic Corp. v. United States,* 511 U.S. 809, 818-19 (1994), an omission may "suggest a deliberate decision" by Congress. If Congress had wished to bar any requirement that individuals provide proof of citizenship when registering to vote, it could have stated as much in the text of the statute. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (noting that "rewriting [a statute] is a job for Congress, if it is so inclined, and not for this Court."). Congress's choice to not include a prohibition of proof of citizenship supports Defendants' argument that Proposition 200 does not violate the NVRA.

Finally, a number of courts have found the NVRA does not act as a ceiling preventing states from enforcing their own laws regarding voter qualifications. In *Association of Community Organizations for Reform Now (ACORN) v. Miller,* 912 F.Supp. 976, (W.D.

Mich. 1995), the Court was asked to determine the constitutionality of the NVRA. In finding that the NVRA did not "violate Congressional authority" under the Constitution, the Court stated that "the NVRA does not regulate the qualifications of voters." *Id.* at 986. The Court also noted that "[e]very court that has considered whether the NVRA alters voter qualifications fixed by a state has found that it does not." *Id.* at 985. One of the cases cited for this proposition was *ACORN v. Ridge*, No. Civ. A. 94-7671, 1995 WL 136913, at *8 (E.D. Pa. March 30, 1995). There the court observed that the "NVRA does not establish who is entitled to vote. Instead, it establishes the method which an *otherwise qualified voter* must follow to exercise his or her right to vote."[8] *Id.* (emphasis added); *see also ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) ("The [NVRA] does not purport to alter the qualifications fixed by the State of Illinois for voters in elections for the Illinois Assembly."). The Court finds these precedents persuasive. There is no indication in the NVRA that Congress wished to supplant all state laws regarding qualifications to

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[8] Plaintiffs cite *Ridge* for the proposition that voter registration forms that request "more information than permitted by the NVRA are contrary to the National Voter Registration Act of 1993." *Ridge*, 1995 WL 136913 at *9. But the forms at issue in that case contained a requirement for notarization, a clear violation of the NVRA. Also, the Court provided no analysis of the issue of additional requirements such as the individual's "color, height, hair and eye color." Without such analysis, the holding of the court that additional information is barred by the NVRA is not persuasive.

vote. The NVRA was an attempt to provide uniformity to the registration process, it was not an attempt to preclude all determinations of voter qualifications by the states. Arizona's decision to require proof of citizenship is not contrary to the plain language of the NVRA.

Because there is no ambiguity in the NVRA, the agency decisions and legislative history are not to be consulted. Plaintiffs have not shown that the requirements of Proposition 200 conflict with a plain language reading of the NVRA. Accordingly, there is an insufficient likelihood of success on the merits regarding Plaintiffs' claim that Arizona is not "accepting and using" the federal form. As a result, the request for a temporary restraining order on this basis will be denied.

B. Preclearance Pursuant to Section V of the Voting Rights Act

Plaintiffs also believe they are entitled to a temporary restraining order based on Defendants' failure to obtain preclearance of Proposition 200. The parties agree that the Department of Justice precleared Proposition 200 in a letter dated January 24, 2005. Plaintiffs believe, however, that "Defendants never revealed to the Justice Department that Arizona would cease to use and accept the federal mail voter registration form for federal elections." (Doc. p. 21) A complete copy of Proposition 200 was attached to Arizona's submission to the Justice

Department. (Submission p. 1) The submission also contained an "Analysis by Legislative Council" pointing out that Proposition 200 required "that evidence of United States citizenship be presented by *every person* to register to vote." (Submission p. 2) (Emphasis added.) Thus, it appears likely that the state's submission adequately apprized the Justice Department of Proposition 200's changes to Arizona law.[9] Plaintiffs have not shown a likelihood of success on the merits regarding preclearance and they are not entitled to a temporary restraining order based on this issue.

Accordingly,

IT IS ORDERED Plaintiffs' Application for Temporary Restraining Order (Doc. 13) is **DENIED**.

IT IS FURTHER ORDERED a Preliminary Injunction Hearing is set for July 19th, 2006 at 9 a.m. and July 20th, 2006 at 9 a.m.

IT IS FURTHER ORDERED Plaintiffs shall submit briefing on the preliminary injunction issues by June 30th, 2006. Defendants shall file their Response by July 7th, 2006 and Plaintiffs' Reply is due July 14th, 2006.

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[9] As recognized by some Plaintiffs, "preclearance .. relates only to compliance with Section 5 [of the Voting Rights Act], and has no bearing on compliance with other federal laws such as the NVRA." (Doc. p. 4 n. 2)

DATED this 19 day of June, 2006.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

[SEAL]

JAN BREWER
SECRETARY OF STATE
STATE OF ARIZONA

June 20, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue N.W.
Washington, DC 20005

Dear Chairman DeGregorio:

Yesterday the United States District Court for the District of Arizona in *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX-ROS, held that the National Voter Registration Act's (NVRA) language regarding the Federal Mail Voter Registration Form (Federal Form) does not preempt Arizona's requirement that individuals present proof of citizenship at the time they attempt to register using that form.

As you know, the correspondence dated March 6, 2006, from the Election Assistance Commission's Executive Director, Thomas Wilkey, precipitated this lawsuit and was used as an exhibit by the plaintiffs. In that letter Mr. Wilkey asserted that Arizona's proof of citizenship requirement when registering to vote with the federal form conflicted with the NVRA. Yesterday's 15 page court opinion and order clearly ruled to the contrary:

> Determining whether an individual is a United States citizen is of paramount importance when determining his or her

> eligibility to vote. In fact, the NVRA repeatedly mentions that its purpose and goal is to increase registration of "eligible citizens." 42 U.S.C. § 1973gg(b)(1)-(2). Providing proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants. Arizona's proof of citizenship requirement *does not conflict* with the plain language of the NVRA.

Order at p. 9. (Emphasis added)

Given the court's sound rejection of Mr. Wilkey's analysis, I once again implore you to properly instruct Arizona voters using the Federal Form about our proof of citizenship requirement. To do otherwise would further disenfranchise Arizona voters using the federal form who unknowingly rely on your erroneous instructions. I am sure that the Commission agrees with me that we should do everything possible to properly educate and inform voters about our new voter registration requirements, and I look forward to your cooperation in this matter.

For your convenience, I have attached the proposed Arizona instructions that were submitted by my staff to yours on December 12, 2005.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Arizona Secretary of State

Enclosure

cc: The Honorable John McCain
The Honorable John Kyl
The Honorable Rick Renzi
The Honorable Trent Franks
The Honorable John Shadegg
The Honorable Ed Pastor
The Honorable J.D. Hayworth
The Honorable Jeff Flake
The Honorable Raul Grijalva
The Honorable Jim Kolbe
The Honorable Terry Goddard
The Honorable Sam Reed, President,
National Association of Secretaries of State
Kevin Kennedy, President,
National Association of State Elections Directors

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4 Revised 10/29/2003 **State Instructions**

Arizona

Registration Deadline – 29 days before the election.

6. ID Number. Your completed voter registration form must contain the number of your Arizona driver license, or non-operating identification license issued pursuant to A.R.S. § 28-3165, if the license is current and valid. If you do not have a current and valid Arizona driver license or non-operating identification license, you must include the last four digits of your social security number if one has been issued to you. If you do not have a current and valid driver license or non-operating identification license or a social

security number, please write "NONE" on the form. A unique identifying number will be assigned by the Secretary of State.

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or non-operating identification license issued after October 1, 1996, this will serve as proof of citizenship and no additional documents are needed. If not, you must attach proof of citizenship to the form. Only one acceptable form of proof is needed to register to vote.

The following is a list of acceptable documents to establish your citizenship

· A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your — current legal name

· A legible photocopy of pertinent pages of a United States passport identifying the applicant

· Presentation to the County Recorder of United States naturalization documents or the number of the certificate of naturalization in box 6~~20 on the front~~ of this form

· The applicant's Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal

Enrollment Number in box 46 ~~on the front of~~ this ~~the~~ voter registration form

- A legible photocopy of a driver license or non-operating licens~~eidentification~~ from another state within the United States if the license indicates that the applicant has provided satisfactory proof of — citizenship

- A legible photocopy of a Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.

If you need to include a photocopy of proof of citizenship, please fold the proof along with the Voter Registration Application and place both items in an envelope and mail to the address provided below.

7. **Choice of Party**. If you are registered in a political party which has qualified for ballot recognition, you will be permitted to vote the primary election ballot for that party. If you are registered as an independent, no party preference or as a member of a party which is not qualified for ballot recognition, you may select and vote one primary election ballot for one of the recognized political parties.

8. **Race or Ethnic Group**. Leave blank.

9. **Signature**. To register in Arizona you must:

   - Must be a Citizen of the United States of America
   - Must be a resident of Arizona and the county listed on your registration

- Must be 18 years of age or more on or before the day of the next regular General Election
- Must not be a convicted felony, unless your civil rights have been restored
- Must not have been adjudicated incompetent

~~**Attention: Proof of Voter Identification**~~

~~(Pursuant to the Help America Vote Act of 2002)~~

~~If this form is submitted by mail and it is the first time you have registered to vote in your jurisdiction, you MUST submit current, valid proof of identification with this application or the first time you vote in a federal election. To send it with this application you should enclose one of the following:~~

~~(1) A COPY of a current and valid photo identification OR~~

~~(2) A COPY of a current utility bill, bank statement, government check, paycheck, or other government document that shows your name and address in the jurisdiction.~~

~~Submitting your proof of identification now with the application will allow you to avoid the federal requirement to show this proof at the polling place or, if voting by mail, to avoid sending it with your mail in ballot. If you do not provide proof of identification, you may cast a provisional ballot.~~

~~Voters may also be required to show proof of identification under State law.~~

Mailing address:
Secretary of State/Elections
1700 W. Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Wedsite [sic]: www.azsos.gov

Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote of July 6, 2006, involving the request from the Arizona Secretary of State to change the instructions on the Arizona Federal Voter Registration Form.

The U.S. Election Assistance Commission is mandated by the National Voter Registration Act (NVRA) to create and regulate the National Voter Registration Form. As part of that responsibility, EAC staff routinely fields requests from states to update or change their state-specific instructions, which are part of the National Form. These instructions cover a wide variety of issues from contact information to registration deadlines.

In late 2005 EAC staff contacted the state of Arizona to ascertain the effect of Proposition 200, a new law that was passed by 62 percent of Arizona voters in November 2004 that required, among other things, documentary proof of citizenship for those wishing to register to vote in Arizona elections.

EAC staff reviewed the Form and the information provided by the state of Arizona. In March 2006 the EAC Executive Director informed the Arizona Secretary of State that based on a review of NVRA that took into account the legislative history of its 1993 enactment, the EAC would not change the instructions on the Form to reflect Proposition 200's requirement for proof of citizenship.

Ultimately, Arizona did not accept the EAC's determination regarding the National Voter Form. Because

of this, a civil lawsuit, *Gonzalez et al. v. State of Arizona* (No. CV 06-1268-PHX-ROX), was filed in federal district court in Arizona by private parties challenging Arizona's refusal to accept the National Form and the proof of citizenship requirement of Proposition 200. The Plaintiffs asked the court for a temporary restraining order against Proposition 200.

On June 19, 2006, United States District Judge Roslyn O. Silver issued a rather lengthy 15-page opinion that not only denied Plaintiffs request, but included a reasoned legal analysis on why Plaintiffs would not succeed on the merits on the case. In her ruling, Judge Silver, a Clinton appointee, indicated that the plain language of NVRA was clear and therefore the notion of legislative intent did not need to be considered. The Judge indicated that requiring documentary proof of citizenship in the registration process did not violate the NVRA or federal law.

Shortly after the court's ruling in the case, Arizona Secretary of State Jan Brewer wrote the EAC to reiterate the court decision and formally request a change in the form to reflect the decision and Arizona's requirements for documentary proof of citizenship. Secretary Brewer made a compelling case that not changing the Federal Form would cause great confusion and require voters who were not instructed to provide proof of citizenship to take an additional step to have their voter registrations completed. I also read the court ruling very carefully and came to the conclusion that the Judge's ruling was sound and not likely to be overturned. Also, based on my own

experience as an election official, I knew that Secretary Brewer's position made great sense. I recall that during my 8 years as director of elections in St. Louis County, Missouri, many voter registration applications forms could not be finalized because voters had not responded to repeated written requests to supply information that was missing. Thus, leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a ballot.

I was also very concerned that with the August 14, 2006, voter registration deadline for the Arizona primary election fast approaching, that time was of the essence on this issue. Thus, using my prerogative as a Commissioner, on July 6, I submitted a Tally Vote to change the instructions on the form so that no more Arizona voters would be disenfranchised by the confusion. The Tally Vote subsequently failed on a 2-2 vote, with Commissioner Donetta Davidson supporting my position for an immediate change in the instructions.

Further clarification of the federal government's role in developing the National Registration Form is needed to prevent future confusion. The NVRA allows for the use of two forms to be used in voter registration, a state form and the National Form. While the state may determine the evidentiary requirements of its voter registration form (consistent with the minimum requirements of the NVRA), the EAC determines the procedural and evidentiary requirements of the National Form. Per the NVRA, the National Form

must be accepted and used by states. Ultimately, the court's opinion did not address the significance of specific action taken by the EAC as a federal regulatory agency in the creation of the National Form. To address this confusion, I will make every effort to set, as an EAC priority, the issuance of federal regulations regarding the National Form. The EAC is required to prescribe such regulation pursuant to the NVRA (42 U.S.C. 1973gg-7).

As one who has his roots in local government, more often than not I look at issues that come before me with that perspective. I also recognize the important role of the states and especially their right to govern their own elections and to implement election laws that they believe are appropriate for the voters of their state, including statutes that protect the integrity of the process. It is that diversity and competition of ideas, just like the diversity and ideas of the American people, that have made America's democracy strong. At the same time, I am strong believer in the Help America Vote Act and the new federal role in improving the methods of conducting elections in the United States. They have also made America's democracy stronger. I would not have accepted the recommendation from the Congress and the appointment from President George W. Bush to the EAC if I did not believe so. Therefore, each decision I make on this commission is carefully weighed against that philosophy. In this instance, I felt that the voters of Arizona have demonstrated their desire to require proof of citizenship for those registering to vote. The

Secretary of State had made a compelling case to support their views. And, a federal court has supported Arizona's analysis of this issue. Thus, I believe the EAC should end the confusion for the voters of Arizona and change the instructions on the Federal Form.

A copy of the Tally Vote, the opinion of the court, and the letters referenced in this statement are also included *on this webpage.*

[SEAL]

OFFICE OF THE VICE CHAIR

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

POSITION STATEMENT
COMMISSIONER RAY MARTINEZ III
JULY 10, 2006

ON THE MATTER REGARDING EAC TALLY VOTE DATED JULY 6, 2006: "*ARIZONA'S REQUEST FOR ACCOMMODATION*"

On Thursday, July 6, 2006, EAC Chairman Paul DeGregorio proposed, via a Tally Vote, that the EAC " . . . amend the Federal Form's state specific instructions to accommodate Arizona's proof of citizenship procedure." In a letter from EAC Executive Director Tom Wilkey to the State of Arizona, dated March 6, 2006, the EAC had previously refused Arizona's request to amend its state specific instructions affixed to the Federal Form and condition the use and acceptance of the Federal Form upon an applicant providing proof of citizenship.[1] Because of the significance of this proposed Tally Vote, I write today to briefly explain my rationale for disapproval.

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[1] See, *Letter from Thomas Wilkey to Arizona Secretary of State*, dated March 6, 2006.

INAPPROPRIATE USE OF TALLY VOTE PROCEDURE

Throughout its 32-month history, the EAC has utilized Tally Votes for routine matters, most typically, for disbursement of Requirements Payments to States under Title II of HAVA.[2] Never has the EAC utilized a Tally Vote procedure to overrule a decision of our executive director. To date, the EAC has recorded *public* votes on matters such as election of officers, adoption of the first set of voluntary guidance regarding statewide voter registration systems, and adoption of the Voluntary Voting System Guidelines of 2005. Moreover, on the one previous occasion when the EAC did consider a significant matter related to the National Voter Registration Act of 1993,[3] the EAC took a public (and unanimous) vote to decide the issue. In my view, this decision is too significant to be taken without the benefit of a properly noticed and convened public meeting or hearing. This is particularly true in light of the fact that if the EAC were to approve this Tally Vote, we would be drastically altering our agency's interpretation of NVRA on a matter of fundamental importance to the American public.

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[2] See generally, *EAC Annual Report to Congress for FY 2004*, Election Assistance Commission (2005); *EAC Annual Report to Congress for FY 2005*, Election Assistance Commission (2006).

[3] See, *Statement of Policy Regarding National Mail Voter Registration Form*, Election Assistance Commission, August 10, 2004, at http://www.eac.gov/statements_resolutions.htm.

Importantly, while each commissioner possesses the authority under rules adopted by the EAC to procedurally object to any Tally Vote, delay its final implementation and require it to be debated at a future EAC public meeting,[4] I will not exercise such authority today. In short, I stand by the EAC's previously articulated legal rationale on this matter and I believe no further EAC action is currently warranted, especially in light of the fact that the EAC is not a party to any litigation on this matter nor has the EAC been ordered to take specific action by any court.

My further rationale for disapproval of this proposed Tally Vote is stated below:

1. **Confusion for Arizona Voters.** Chairman DeGregorio contends that the EAC 's prior determination of this matter,[5] together with the "preliminary" decision by U.S. District Court Judge Roslyn Silver as well as Arizona's current position regarding the Federal Form " . . . have created significant confusion for the Arizona voters." As a result, Chairman DeGregorio proposes that we " . . . not allow this confusion to disenfranchise Arizona voters [and that] we amend the Federal Form's state

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[4] See, EAC Tally Vote "Procedures for Voting by Circulation," certified by a vote of 4-0 on May 4, 2004.

[5] *Letter from Thomas Wilkey to Arizona Secretary of State,* dated March 6, 2006.

specific instructions to accommodate Arizona's proof of citizenship procedure."

However, nothing has changed with regard to how Arizona treats the Federal Form, even after the opinion issued last month by Judge Silver. That is, Arizona Secretary of State Jan Brewer, pursuant to Proposition 200, has previously instructed Arizona county recorders to treat the Federal Form as incomplete if an applicant submits the form without appropriate proof of citizenship.[6] Judge Silver's opinion does not bar the State of Arizona from requiring proof of citizenship upon receipt of the Federal Form. Accordingly, any voter registration applicant utilizing the Federal Form in Arizona is today treated in the *exact same manner* as before Judge Silver's opinion. Furthermore, since continued litigation and/or appeals on this matter are likely – including a hearing currently pending before Judge Silver later this month to decide the merits of a preliminary injunction sought by the plaintiffs in *Gonzalez v. State of Arizona*, (No. CV 06-1268-PHX-ROS) – it is evident that any action today by the EAC may be premature.

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[6] See, *Letter from Secretary Jan Brewer to Chairman DeGregario*, dated March 13, 2006.

Furthermore, reversing our current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue. Already, at least one state is considering legislation in the wake of Arizona's decision to require proof of citizenship upon voter registration.[7] Other states are likely to follow. For the EAC to reverse its position at a time when the courts have only just begun to contemplate this important issue is untimely at best. What about the confusion that will be caused if today we grant Arizona its request for an accommodation and other States are left wondering whether they too, should (or can) be requiring proof of citizenship with the Federal Form? Will each State need to specifically come before the EAC to request an accommodation? Will each State need to pass a law or promulgate an administrative rule requiring proof of citizenship with the Federal Form before requesting an accommodation from the EAC? Or, will this specific decision for Arizona be deemed by the EAC as applicable across the board for

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[7] April Washington "Election Officials Split on Voting Bill," Rocky Mountain News, July 4, 2006 (referencing Colorado election officials responding to the proposed 'proof of citizenship' bill).

all NVRA-covered jurisdictions? These are but a few of the many questions which will inevitably arise if we were to approve this Tally Vote – questions, by the way, which this Tally Vote does not address. State and local jurisdictions are best served by an EAC that exercises its limited authority under both NVRA and HAVA in a measured, deliberate and *consistent* manner.

Given that the EAC is not a party to the specific litigation referenced by Chairman DeGregorio; that the EAC has not been ordered by Judge Silver or any other court to take any specific action on this matter; that a voter registration applicant in Arizona is treated exactly the same today as before last month's opinion by Judge Silver; that other States will be influenced by actions taken on this matter both by the courts and the EAC; and, that continued litigation and appeals are likely on this matter, it is clear that the EAC should today refrain from any further action that may ultimately cause even greater uncertainty not just for voters in Arizona, but for the entire country.

2. **EAC Precedent Already Established.** Last year, the EAC was presented with an analogous situation as that which confronts us today regarding the citizenship requirement in Arizona. That is, after passage of a new Florida law

mandating that a voter registration applicant check a box attesting to the applicant's mental capacity, the State of Florida requested that the EAC amend its state-specific instructions affixed to the Federal Form to condition the use and acceptance of the Federal Form in a similar manner as is now done on the state-issued Florida voter registration form.

In rejecting Florida's request to allow conditional use and acceptance of the Federal Form, the EAC general counsel's office, with the unanimous consent of the EAC commissioners, wrote the following:

> " . . . Florida's proposed policy, to treat all Federal Mail Registration Forms as incomplete, violates the provisions of the NVRA. The NVRA requires States to both "accept" and "use" the Federal Form. Under Florida's policy, State officials would take in the Federal Form, only to turn around and require its user to re-file or otherwise supplement their federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither "accepted" nor "used" by the State. That language of NVRA mandates that the Federal Form,

> without supplementation, be accepted and used by states to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. ***Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate.*** 42 U.S.C. 15483."[8] (Emphasis added.)

Clearly, in refusing Florida's request last year, the EAC not only established its own interpretive precedent regarding the use and acceptance of the Federal Form, but it also upheld established precedent from our predecessor agency, the Federal Election Commission. It is difficult for me to understand how today, we could reverse our agency's position on this matter as it relates specifically to Arizona, and yet, somehow distinguish why Florida should not also be allowed to similarly condition the Federal Form. And, if this were to result, we would find ourselves headed down that perilous

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[8] See, Letter from Gavin Gilmour, Associate General Counsel, to Dawn Roberts, Director of the Division of Elections, July 26, 2005.

"slippery slope" where registration requirements would be markedly different from state to state for any applicant using the Federal Form – one of the principle reasons why Congress passed NVRA and created the Federal Form in the first place.

3. **Break from Consensus Decision-Making by the EAC.** This proposed Tally Vote will mark the first time that a decision by the EAC commissioners will be decided by a less than unanimous basis.* As such, regardless of the ultimate outcome, I am deeply troubled that a Tally Vote on this matter could produce a fundamental turning point in how present and future EAC commissioners approach contentious election administration issues. This, in my view, would be an unfortunate development for this agency. While public opinion among EAC stakeholders is still mixed as to the benefits and drawbacks of a federal agency such as the EAC, there has been praise from nearly all fronts for the way the EAC has previously navigated difficult, politically-tinged issues while still maintaining unanimity on such matters.

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* At least one hundred Tally Votes have been recorded by the EAC, with all Commissioners voting in the affirmative for each of the prior Tally Votes.

For example, in the months leading up to the November 2004 presidential election, the issue regarding "casting" and "counting" of provisional ballots received much media scrutiny, as well as significant litigation in both state and federal courts throughout the country. Rather than wade directly into the issue by utilizing our voluntary guidance authority under Sections 311 and 312 of HAVA[10] and, despite significant pressure to do so from various partisan interests, the EAC was able to deftly navigate this contentious issue. Ultimately, the EAC unanimously passed a timely resolution regarding provisional voting[11] and prudently allowed the courts to decide this controversial and politically-charged matter.

Likewise, the EAC faced similar issues on at least two occasions last year. In March of 2005, the EAC was apprised of a decision by the State of Arizona to condition the casting of provisional ballots in federal elections to the showing of proper voter identification as required by Proposition 200. In response, the EAC commissioners unanimously agreed to initiate collaborative discussions with

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[10] See 42 U.S.C. § 15501; 42 U.S.C. § 15502.

[11] See, EAC Resolution 2004-002: "Provisional Voting," October 12, 2004, at http://www.eac.gov/docs/Resolution%20-%20Provisional%20Voting.pdf.

the Department of Justice (DOJ) to interject our agency's view that such conditioning of provisional ballots was inconsistent with HAVA. Ultimately, DOJ clarified its previously-issued pre-clearance letter to Arizona and Arizona in turn, eliminated the conflict between Proposition 200 and HAVA's provisional voting requirements.

Similarly, as has already been explained, the EAC was asked last year by the State of Florida to amend its state-specific instructions affixed to the Federal Form in order to condition the use and acceptance of the Federal Form upon the applicant furnishing additional information regarding mental capacity. After careful analysis, the EAC's general counsel, with the unanimous support of EAC commissioners, issued a determination to Florida which upheld the 13-year precedent of the NVRA – that the Federal Form, as promulgated by the EAC, must be unconditionally used and accepted by all NVRA-jurisdictions.

What is significant about the examples cited above – which involve issues that touch upon both the voluntary guidance and limited regulatory authority possessed by the EAC – is that when faced with these politically difficult decisions, the EAC commissioners have heretofore chosen a consensus-driven path that ***does not*** seek to alter the carefully

> crafted balance of federal/state roles regarding election administration. Such a measured and deliberate approach is most appropriate at this particular time for the EAC, especially as we approach a contentious 2006 general election in which state and local election administrators will need the support, resources and *credibility* of a fully functioning EAC. My strong concern is that this particular Tally Vote may lead the EAC down a path that many EAC stakeholders have explicitly said they do not want: an overly partisan federal agency that is more prone to deadlock than to fulfilling its ultimate and, in my view, most important promise of serving as a national clearinghouse and creating the "gold standard" in national voting system standards and certification.

CONCLUSION

Lastly, I would like to reiterate my ongoing commitment to the essential role played by state and local governments in administering the process of election administration. As an EAC commissioner, I have made it my priority to build a genuine and lasting partnership with election officials at all levels of government – irrespective of political party affiliation – and I have actively sought their input to guide my work on the EAC. I will continue to honor and support the strong tradition of state and local control over the process of election administration. I would

also like to specifically mention the high personal regard I have for Arizona Secretary of State Jan Brewer. She and I have had a chance to extensively discuss this matter and, despite our obvious policy disagreement, I believe she is committed to serving the people of Arizona with integrity and fairness – as she has throughout her extensive and notable career in public service.

Perhaps it is inevitable that someday, Congress will decide to vest greater authority upon the EAC, particularly as politically-charged issues become more frequent. While I reserve judgment today on whether or not such a development merits consideration, the EAC that currently exists – as envisioned by nearly all who participated in the development of HAVA – was one relegated largely to voluntary guidance and an advisory role on matters of election administration. As such, when any matter comes before this agency which would significantly alter the carefully crafted balance of federal/state authority that is implicit in laws such as NVRA and HAVA, I believe the EAC has an obligation to exercise its voluntary guidance *and regulatory authority* in the most limited, deliberative and transparent manner possible.

For the reasons put forth in Mr. Wilkey's letter to Arizona dated March 6, 2006, and, after careful and due consideration of Judge Silver's opinion, I continue to believe that our current agency position accurately reflects the plain language of NVRA, as well as Congressional intent in passing this historic law.

While I respect Chairman DeGregorio's right to bring this matter before the EAC, for the reasons stated above, I respectfully disapprove of this proposed Tally Vote.

Respectfully Submitted,

/s/ Ray Martinez III

COMMISSIONER RAY MARTINEZ III

July 10, 2006

CV 06-01268-PHX-ROS, July 15, 2008 (AMENDED)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. **State of Arizona, et al.,** Defendants.	CV 06-01268-PHX-ROS Phoenix, Arizona July 15, 2008 8:54 a.m.

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL – Day 3 (AMENDED)

(Pages 283 through 520, inclusive.)

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street,
Suite 312, Spc. 35
Phoenix, Arizona 85003-2150
(602) 322-7245

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

United States District Court

A. Yes. They were born at home.

Q. Proposition 200 has a statutory provision that provides for identification and one of those pieces of identification is a birth certificate that verifies citizenship. Are you familiar with that part of the statute?

A. Yes.

Q. Is that a difficulty for members of the Indian tribes and members of Inter Tribal Council of Arizona?

A. Yes. It's, again, because of the issue I outlined in terms of having access to a hospital and having births at home, this becomes an issue. So that has been a problem particularly for the more elder people it is a problem and then to obtain a birth certificate, the process of doing that can take quite an effort on the part of an individual or their families to obtain proper birth certificate that would have to be a duplicate.

MR. SPARKS: And there I was referring, for the record, Your Honor, to ARS Section 16-166, paragraph 2.

BY MR. SPARKS:

Q. Referring to ARS, 16-166, I'm going to read this and ask you. Another form of ID is an applicant's Bureau of Indian Affairs card number. Are you aware

of anything called a Bureau of Indian Affairs card number?

A. No, I'm not. I'm not familiar with that at all in terms of that particular designation.

Q. So as far as you're concerned, it doesn't exist. Is that [475] correct?

A. Yes. I have never heard of one or seen one.

Q. What about a tribal treaty card? You said the Apaches and Navajos have treaties; is that correct?

A. Yes.

Q. Do you know do they have tribal treaty cards?

A. Again, I have never seen one or heard of one.

Q. As far your total knowledge of the Athabaskan-speaking group with treaties with the United States, they have no treaty cards, do they?

A. No, they don't.

Q. And what about tribal enrollment numbers, do American Indians, members of recognized tribes in Arizona have tribal enrollment numbers?

A. They may have tribal enrollment numbers but it's really not a common thing. I would think it's not used for any real purpose. I would think of it more of an administrative thing that tribes may have to keep track of enrollment. But it's not one that is used for identification or any other purpose.

Q. Now, although this isn't – this is not in the statute, a reference to tribal ID cards has come up. Do all tribes have tribal identification cards?

A. I believe they do. I believe they do. Well, the tribes from the Inter Tribal Council of Arizona do have ID cards or some form of tribal identification. I am not sure if other

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV-06-1268-PHX-ROS consolidated with: No. CV-06-1362-PCT-JAT No. CV-06-1575-PHX-EHC **ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case comprises two actions: (1) *Gonzalez v. State of Arizona*, CV 06-1268-PHX-ROS (filed May 9, 2006) ("Gonzalez"); and (2) *Inter Tribal Council of Ariz., Inc. v. Brewer*, No. CV 06-1362-PCT-JAT (filed May 26, 2006) ("ITCA").[1]

Plaintiffs seek to permanently enjoin enforcement of the Arizona Taxpayer and Citizen Protection Act, also known as "Proposition 200." Enacted pursuant to a voter initiative in the 2004 general election, Proposition 200 requires proof of citizenship to register to vote and proof of identification to vote in person on election day. A.R.S. §§ 16-166(F), 579(A).

Collectively, Plaintiffs assert that these requirements violate the Equal Protection Clause, First

[1] The third consolidated action, *Navajo Nation v. Brewer*, CV 06-1575-PHX-EHC (filed June 20, 2006), was dismissed by stipulation of the parties on May 27, 2008. (Doc. 775).

Amendment, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*[2] (Doc. 352; *ITCA*, Doc. 1).

For the reasons stated below, Plaintiffs' request for relief will be denied.

PROCEDURAL BACKGROUND

In May and August 2006, Plaintiffs filed motions for preliminary injunction, seeking to enjoin the enforcement of Proposition 200. (Docs. 7, 146, 149). On September 11, 2006, the motions were denied. (Doc. 183).

Plaintiffs appealed the denial, (Docs. 184, 189), and requested an emergency injunction pending appeal, *see Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006). On October 5, the Ninth Circuit granted the request for an emergency injunction pending appeal. *Id.* The Supreme Court vacated the emergency injunction on October 20, 2006. *Id.* at 8.

On April 20, 2007, the Ninth Circuit affirmed the Court's order denying preliminary injunctive relief. *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (2007). The parties then underwent significant discovery and motions practice extending over a year and a half.

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[2] ITCA and Gonzalez Plaintiffs' other claims were dismissed on August 28, 2007 and February 5, 2008, respectively. (Docs. 330, 611).

The Court endeavored to give Plaintiffs access to all data in Defendants' possession to make their case.

Beginning July 9, 2008, the Court held a six-day bench trial to determine whether a permanent injunction should issue. Post-trial brieting was completed on July 30, 2008.

FACTUAL BACKGROUND

I. Proposition 200

On November 2, 2004, Arizona voters approved a voter initiative called Proposition 200, which was officially proclaimed law by Governor Janet Napolitano on December 13, 2004.[3] (Trial Tr. 648). It was then submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act.[4] *Id.* Upon approval by the Justice Department, Proposition 200 became effective January 25, 2005. *Id.*

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[3] The Arizona Constitution authorizes voter initiatives, which then become law "when approved by a majority of the votes cast thereon and upon proclamation of the governor." Ariz. Const. art. IV § 1.

[4] Arizona is a covered jurisdiction under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Therefore, Arizona is required to preclear any new voting "standard, practice, or procedure" with either the United States Attorney General or the District Court for the District of Columbia to ensure its new standard, practice, or procedure does "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." *Id.*; *see also Purcell*, 549 U.S. at 6.

A. Proof of Citizenship to Register to Vote

Before Proposition 200, a person seeking to register to vote did not need to provide proof of citizenship. (Ex. 6). Rather, the person signed a statement, under penalty of law, that the applicant is a U.S. citizen. *Id.*

Proposition 200, which amended A.R.S. §§ 16-152, 166, requires individuals wishing to register to vote to provide proof of citizenship. An applicant is still required to affirm, under penalty of law, that the applicant is a U.S. citizen. A.R.S. § 16-152(14). Section 16-166, as amended, states:

> The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
>
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
>
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
>
> 5. Other documents or methods of proof that are established pursuant to the [I]mmigration [R]eform and [C]ontrol [A]ct of 1986.
>
> 6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

A.R.S. § 16-166(F).

Without this proof, a person may not register to vote. *Id.* This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. (Trial Tr. 701). There is no provision that permits waiver of the proof of citizenship requirement.

If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship. (Rodriguez Dep. 77-78, Jan. 22, 2008; Altaha Dep. 12, Jan. 14, 2008; Wayman-Trujillo Dep. 50, 51, Jan. 9, 2008; Rodriguez Dep. 23, Aug. 2, 2006; Justman Dep. 15-16, Aug. 1, 2006). Counties are required to provide a blank voter registration form with this letter. (Ex.4, at 54).

Under the procedures implemented immediately after Proposition 200, an applicant relying on naturalization documents to provide proof of citizenship was required to provide a "certificate of naturalization number." (Trial Tr. 654; *see also* Ex. 147). It was soon learned, however, that this number could not be used to verify the person's citizenship using the federal immigration online database, the Systematic Alien Verification for Entitlements Program ("SAVE"). (Trial Tr. 654; Ex. 305). Rather, the database used the alien registration number, or "A-number." (Trial Tr. 654; Ratliff Dep. 32, Apr. 22, 2008). Consequently, the election procedures were amended to instruct an applicant to provide the alien registration number, which is also listed on a certificate of naturalization.[5] (Trial Tr. 654; Ex. 1357). This change was precleared

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[5] Before approximately 1975, certificates of naturalization did not have A-numbers printed on them. (Quinn Dep. 54, Apr. 22, 2008; *see also* Ex. 961 (certificate of naturalization from 1960 that does not have A-number)).

by the Justice Department on December 6, 2007. (Kanefield Dep. 8, Jan. 1, 2008).

B. Elector Identification to Cast a Ballot

i. *Voting In Person on Election Day*

Before Proposition 200, a person seeking to vote in person on election day did not need to provide proof of identification. (Ex. 5). Rather, the person stated his or her name and residence, and, if the name was found on the voter rolls, the person signed the signature roster and was given a ballot. *Id.*

After Proposition 200, which amended A.R.S. § 16-579, an elector voting in person on election day must now present proof of identification. A voter may obtain a regular ballot[6] only by presenting either one form of identification with a photograph, name, and address, or two forms of identification that bear the name and address. A.R.S. § 16-579(A).

The specific types of identification are set forth in the Election Procedures Manual, which has the force and effect of law. A.R.S. § 16-452(C). The current version, approved in October 2007 (the "Manual"), was drafted by Secretary of State Jan Brewer and then submitted to Governor Janet Napolitano and Arizona Attorney General Terry Goddard for review and approval. *See generally* Ex. 4; A.R.S. § 16-452(A)-(B). It was then precleared by the Department of Justice.

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[6] The different types of ballots are discussed *infra*, Part C.

Acceptable forms of identification with a photograph, name, and address are: (1) a valid Arizona driver license; (2) Arizona nonoperating identification license; (3) tribal enrollment card or other form of tribal identification; or (4) other federal, state, or local government issued identification. (Ex. 4, at 128).

Acceptable forms of identification without a photograph that bear the name and address of the elector are: (1) utility bill dated within 90 days of the date of the election;[7] (2) bank or credit union statement dated within 90 days of the date of the election; (3) valid Arizona vehicle registration; (4) property tax statement of the elector's residence; (5) vehicle insurance card; (6) recorder's certificate; or (7) federal, state, or local government issued identification, including a voter registration card issued by the county recorder. *Id.*

In addition to these forms of identification, an elector who identifies himself or herself as a member of a federally recognized American Indian tribe may present tribal identification, including: (1) a tribal identification or enrollment card issued under the authority of a federally recognized Indian tribe, nation, community, or band, a tribal subdivision or the Bureau of Indian Affairs; (2) a Certificate of Indian Blood issued to a tribal member under the

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[7] "A utility bill may be for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television." (Ex. 4, at 128).

authority of a tribe or by the Bureau of Indian Affairs; (3) a voter registration card for tribal elections issued under the authority of a tribe; (4) a home site assignment lease, permit or allotment issued under the authority of a tribe, tribal subdivision, or the Bureau of Indian Affairs; or (5) a grazing permit or allotment issued to a tribal member under the authority of a tribe, tribal subdivision, or the Bureau of Indian Affairs.[8] (Docs. 775 & 776; Trial Tr. 680-81).

In addition, several counties have added "official election mail" sent by the county to individual voters to the list of acceptable non-photo identification. (*See* Trial Tr. 748; Osborne Dep. 60-61, Jul. 31, 2006 (Maricopa County); Dastrup Dep. 10, Aug. 1, 2006 (Navajo County); Hoyos Dep. 27-28, Jan. 16, 2008 (Pinal County); Hansen Dep. 55, Aug. 1, 2006 (Coconino County); Pew Dep. 21-22, Aug. 1, 2006 (Apache County); Rodriguez Dep. 145-46, Aug. 2, 2006 (Pima County); Wayman-Trujillo Dep. 107-08, Jan. 9, 2008 (Yavapai County). *But see* Stallworth Dep. 32-33, Jan. 18, 2008 (Yuma County)). The counties are not required, however, to provide election mail, and their ability to do so is subject to budgetary constraints. (*See* Osborne Dep. 83-84, 86, Jan. 14, 2008; Wayman-Trujillo Dep. 108-09, Jan. 9, 2008).

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[8] These forms of tribal identification were part of the terms of settlement in *Navajo Nation v. Brewer*, CV 06-1575. They were precleared by the Department of Justice on May 22, 2008, (Doc. 774), and are currently an addendum to the Manual, (Trial Tr. 681). The next version of the Manual will include this addendum. *Id.*

ii. *Voting Early*

Proposition 200 did not change the requirements for voting early. Every registered voter is eligible to vote by early ballot. A.R.S. § 16-541. Proof of identification is not required to obtain or submit an early ballot. A.R.S. §§ 16-542, -547. An early ballot may be mailed or dropped off at a polling place by 7:00 p.m. on election day. A.R.S. § 16-548.

All counties also allow for in person early voting at certain polling places. No identification is required of early voters who wish to vote in person. (Trial Tr. at 689).

All early ballots, whether cast by mail or in person, are subject to signature verification, which the State and counties believe is sufficient to prevent voter fraud. (Trial Tr. 746; Rodriguez Dep. 151-52, Jan. 22, 2008; Hoyos Dep. 43-44, Jan. 16, 2008; Wayman-Trujillo Dep. 113, Jan. 8, 2008; Owens Dep. 111-12, Aug. 30, 2006; Dastrup Dep. 28, Aug. 1, 2006; Justman Dep. 35, Aug. 1, 2006; Hansen Dep. 70, Aug. 1, 2006; Pew Dep. 19, Aug. 1, 2006; Osborne Dep. 75, July 31, 2006).

C. Types of Ballots

There are three types of ballots provided for in person voting on election day: regular, provisional, and conditional provisional. (Ex. 4, at 129). The type of ballot issued depends upon what form of proof of identification is provided by the voter. *Id.*

i. *Regular Ballot*

If the voter's proof of identification matches the information on the voter rolls, the voter is issued a regular ballot. *Id.*

ii. *Provisional Ballot*

"If the name and address on the identification do not reasonably appear to be the same as the name and address on the signature roster or the photo does not reasonably appear to be the elector, then the elector shall not be issued a regular ballot, but shall be issued a provisional ballot." *Id.*; *see also id.* at 136. For example, if a person changes her name after marriage, but has not yet updated either the voter rolls or her identification, she will be issued a provisional ballot. (Trial Tr. at 708-09). In addition, if a voter presents one form of tribal identification, the voter is issued a provisional ballot. (Ex. 4, at 135).

If a voter casts a provisional ballot, the voter is not required to take additional steps. The county verifies that the voter's signature on the provisional ballot matches that on the voter rolls, and, as long as the voter did not already vote for that election, the voter's ballot is counted. (Ex. 4, at 164-65, 167-69).

iii. *Conditional Provisional Ballot*

If the voter presents only one form of non-photo identification or does not present any form of identification, the voter is issued a conditional provisional ballot. *Id.* at 129, 135.

If the voter casts the conditional provisional ballot, the voter must present proof of identification at certain designated locations within three-to-five days after the election, depending on the type of election. *Id.* at 135.

D. Availability and Cost of Proof of Citizenship

i. *Arizona Driver License and Non-Operating Identification Card*

A new Arizona driver license costs: $25.00 if the driver is between the ages 16 and 39; $20.00 if the driver is between the ages of 40 and 44; $15.00 if the driver is between the ages 45-49; and $10.00 if the driver is age 50 or older. (Ex. 676). A replacement or duplicate license costs $4.00. *Id.*

An Arizona non-operating identification card costs $12.00. Arizona Dep't of Transp., Motor Vehicle Div. ("MVD"), Frequently Asked Questions ("MVD FAQ") (last visited Aug. 3, 2008), http://www.azdot.gov/mvd/faqs/scripts/faqs.asp?section=dl#5. For persons age 65 or older, or anyone receiving federal Supplemental Security Income disability payments, there is no fee. A.R.S. § 28-3165(J); MVD FAQ.

Approximately 90% of voting-age Arizona citizens possess an Arizona driver's license. (Trial Tr. 706). There was no evidence regarding what portion of the remaining 10% had other forms of photo identification, including Arizona non-operating identification cards.

In order to obtain a new Arizona driver's license or non-operating card, an applicant must present identification consisting of either: (1) two documents, one of which has a photograph, or (2) three documents with no photograph. Arizona Dep't of Transp., MVD, Identification Requirements (last visited Aug. 4, 2008), http://mvd.azdot.gov/mvd/formsandpub/viewPDF.asp?lngProductKey=1410&lngFormInfoKey=1410. In either case, one of the documents must be considered a "primary" document. *Id.* (listing acceptable primary and secondary documents).

ii. *Birth Certificate*

In Arizona, a replacement birth certificate and a delayed birth registration costs $10.00. (Ex. 672, 675). To obtain a delayed birth certificate for a child who is 1-14 years of age, the following documentation must be provided: (1) an affidavit by someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was five years old stating the child's name, date of birth, place of birth, and the date the document was created; and (3) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created. (Ex. 672).

To obtain a delayed birth certificate for a child who is 15 years of age or older, the following documentation must be provided: (1) an affidavit by

someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was ten years old stating the child's name, date of birth, place of birth, and the date the document was created; (3) an independent factual document that was established at least five years prior to the application date stating the child's name, date of birth, place of birth, and the date the document was established; and (4) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created. *Id.* In other states, the cost and means of obtaining a birth certificate varies. (*See* Ex. 673).

iii. *Passport*

The cost for obtaining a passport book or card is $100 and $45, respectively. Dep't of State, Passport Fees (last visited Aug. 3, 2008), http://travel.state.gov/passport/get/fees/fees_837.html.

iv. *Certificate of Naturalization*

A replacement certificate of naturalization costs $380. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Instructions for N-565, Application for Replacement Naturalization/Citizenship Document (last visited Aug. 3, 2008), http://www.uscis.gov/files/form/N-565instr.pdf.

v. *Bureau of Indian Affairs Card, Tribal Treaty Card, or Tribal Enrollment Card*

Bureau of Indian Affairs and tribal treaty cards are not in use in Arizona. (Trial Tr. 474-75).

All tribes in Arizona, except the Havasupai Tribe and Navajo Nation,[*] issue tribal enrollment cards. (*Id.* at 483, 486; Ex. 1325). Cards issued by the Hopi Tribe, Yavapai-Apache Nation, and Tonto Apache Tribe do not include enrollment numbers. (Ex. 1325).

Tribal enrollment cards are free for most tribes. For the Hopi Tribe, the first card is free, and an additional card is $15. *Id.* For the Yavapai-Apache Nation, a card costs $5.00. *Id.* And for the Colorado River Indian Tribe, the first card is free, and an additional card is $12.00. *Id.*

E. Verification of Proof of Citizenship

Photocopies of birth certificates, photocopies of U.S. Passports, tribal identification numbers, and naturalization certificates presented in person or via photocopy are accepted on their face without subsequent verification. (Ex. 4 at 48; Trial Tr. 700-01; Rodriguez Dep. 86-87, Jan. 22, 2008; Dean-Lytle Dep. 50, Jan. 16, 2008; Osborne Dep. 38-39, 50, Jan. 14,

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[*] Navajo Nation is not a member of the Inter Tribal Council of Arizona, Inc., and was represented by separate counsel in this litigation. *See Navajo Nation v. Brewer*, CV 06-1575. It did not challenge Proposition 200's proof of citizenship requirement. (*See* Trial Tr. 483-84).

2008; Wayman-Trujillo Dep. 63-65, Jan. 9, 2008; Rodriguez Dep. 68, 87, Jan. 22, 2008; Dean-Lytle Dep. 50, Jan. 16, 2008; Osborne Dep. 50, Jan. 14, 2008; Kanefield 19-21, Jan. 11, 2008; Marin Dep. 45-47, 113, Jan. 18, 2008).

A-numbers are verified using USCIS's online system called the Systematic Alien Verification for Entitlements Program (SAVE). (Ex. 4 at 47; Trial Tr. 735).

Driver's licenses and non-operating identification cards are verified using the Secretary of State's online voter registration system, VRAZ,[10] which collects voter registration information from the counties and compares the information about the registrants and existing voters against the MVD database. (Exs. 38, 165, 167, 307.)

VRAZ flags applicants whose Arizona driver's licenses were issued before October 1, 1996 or are coded "Type F." (Exs. 126, 153, 175). One thousand three hundred applicants were unable to register online due to attempts to use a license issued before October 1, 1996 or a Type F license. (Kanefield Dep. 30-31, Jan. 11, 2008). It is unclear how many of these applicants were subsequently able to register.

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[10] VRAZ also checks voter registration information against the Social Security Administration database, as well as Arizona death records and records of felony convictions. (Exs. 38, 165, 167, 307).

Since 1996, before issuing an Arizona license, the MVD has verified lawful presence, and, since 2000, it has issued Type F licenses to non-citizens who establish lawful presence. (Yanofsky Dep. 14, 34, Jan. 10, 2008). Thus, even though MVD is not charged with monitoring citizenship, and even though some older licenses belonging to non-citizens may not be coded Type F, there is a reasonable relationship between the type of license issued and a person's citizenship status.

Because a license does not reflect whether it is Type F on its face, a recently naturalized citizen who uses a Type F license to register to vote may have to provide additional proof of identification. (Ex. 175). In such circumstances, a naturalized citizen has the option of obtaining an updated license by presenting a naturalization certificate to the MVD and pay a fee of $4, or registering to vote without incurring additional cost using a naturalization certificate. (Yanofsky Dep. at 65-66; Gage Dep. 90, Jan. 10, 2008).

F. Impact of Proposition 200

i. *Proof of Citizenship Requirement*[11]

Between January 2005 and September 2007, the number of applicants in 14 of Arizona's 15 counties[12] unable (initially) to register to vote because of Proposition 200 was 31,550.[13] (Ex. 883, Table 1; Trial Tr. 246).

Of these applicants, Plaintiffs' expert, Dr. Louis Lanier, estimated that 5,258, or 16.7%, were Latino, which was 2.8% higher than their representation in total number of registration applicants. (Ex. 883,

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[11] ITCA Plaintiffs' expert, Dr. Ronald Sissons, testified in his deposition that 2% of Arizona's non-registered, voting eligible population did not have proof of citizenship. (Sissons Dep. 9, 10, Aug. 11, 2006). His deposition testimony was admitted at trial by stipulation of the Parties. (Doc. 1014).

Dr. Sissons testified to the same at the preliminary injunction hearing. (Prelim. Inj. H'rg Tr. 138-39, Aug. 30, 2006). The Court, however, did not then find this testimony reliable, and the Court does not find it reliable here. (*See* Doc. 219 at 9 ("The Court has reservations regarding the reliability of [Dr. Sisson's] statistics."); *id.* at 10 ("[T]he Court was not presented with sufficiently reliable information regarding the number of voters that do not have adequate forms of identification.")).

[12] This number does not include rejected voter registration forms from Santa Cruz County, which did not produce any forms, and did not include a portion of the rejected forms from Yuma County. (Trial Tr. 246-47).

[13] This number is exclusive of duplicate forms, forms with missing information, forms with "no" in the U.S. citizenship field, and forms with a registration date prior to January 1, 2005. (Trial. Tr. 242). The total inclusive of these forms is about 38,000. *Id.*

Table 2). To arrive at this estimate, Dr. Lanier used a list of Latino surnames compiled by the U.S. Census Bureau known as the "Passel-Word List." (Trial Tr. 242). This list divides surnames into five categories based on the probability that they represent a Latino person. *Id.* Dr. Lanier assumed names listed as "heavily Hispanic" and "generally Hispanic" were surnames for Latino persons for purposes of his analysis. *Id.* Defendants' expert, Dr. Jeffrey Zax, did not assert that use of the Passel-Word List was an inappropriate means of predicting whether a person is Latino. (Trial Tr. 800).

Most rejected applicants listed their birthplace in the United States: 86.6% of Latinos, and 92.9% of non-Latinos. (Ex. 885, Table 3).

By comparing the names on rejected voter registration forms to the voter rolls, Dr. Lanier determined if an applicant, initially unsuccessful, was ultimately able to register to vote through a later successful application. (Trial Tr. 244). Of the 31,550 applicants initially unable to register to voter [sic], approximately 11,000, or 30%, were subsequently able to register to vote. (Trial Tr. 329). Of the approximately 20,000 applicants unable to register to vote, 4,013, or about 20%, were Latino. (Ex. 884, Table 2; Trial Tr. 835-36).

Assuming that everyone prevented from registering by Proposition 200 was allowed to register, i.e., Proposition 200 had not gone into effect, Dr. Lanier predicted that 13.8% of the electorate would have been Latino. (Ex. 883, Table 4). Using Dr. Lanier's

data, Dr. Zax calculated the percentage of the electorate that was Latino with Proposition 200 in effect as 13.7% – a difference of 0.1%. (Trial Tr. 799). Using the same data and incorporating Dr. Engstrom's turnout date, Dr. Zax also calculated what the Latino voter turnout would have been in the 2006 general election for Secretary of State with and without Proposition 200. *Id.* at 831. The difference in the Latino voter turnout was 0.06%. *Id.*

Plaintiff's expert Dr. Rodolfo Espino examined the effects of Proposition 200 on the flow of voter registrations in Arizona and its individual counties. He examined the 941 days before and after the implementation of Proposition 200. (Trial. Tr. 377). Both Latinos and non-Latinos experienced a drop in their registration rates following the implementation of Proposition 200 when compared to the period before Proposition 200. (Trial Tr. 391). This drop is not unexpected because the period before Proposition 200 included the 2004 Presidential election, which was accompanied by a drastic increase in the number of voter registrations. (Ex. 879, Chart 1[14]).

Statewide, the percent drop in number of individuals registered to vote per week was 36.67% for Latinos and 35.75% for non-Latinos, a difference of

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[14] Although Dr. Lanier, no longer relied upon the expert report in which this chart is included in reaching his conclusions in this case, (Trial Tr. 271), the Court finds reliable the portion of Chart 1 that reflects actual voter registrations, as opposed to predicted voter registrations.

0.92%. (Trial Tr. 411; Def. Imp. Ex. 2, Table 3). On a county-by-county basis, the percent drop for Latinos was greater than that of non-Latinos in seven of Arizona's fifteen counties, specifically Apache, Gila, Graham, Greenlee, Pima, Santa Cruz, and Yuma. (Def. Imp. Ex. 2, Table 4; Trial Tr. 432-33). Examining the percent change in weekly registration rates before and after Proposition 200 based upon the regression slope, the decline in the rate of Latinos becoming registered to vote was worse than non-Latinos in five of fifteen counties, specifically Apache, Greenlee, Pima, and Santa Cruz. (Trial Tr. 421-23; Ex. 877, Table 1).

ii. *Proof of Identification*

In the 2006 primary, 2006 general, and the 2008 Presidential preference elections, 3,135,951 ballots were cast. (Trial Tr. 683-84). Of these, 4,194 ballots, or 0.13%, were uncounted due to lack of proof of identification. (Trial Tr. 318). Of the uncounted ballots, 461, or 11%, were Latino. *Id.* As of September 2007, Latino represented 12.3% of registered voters. (Ex. 886).

Regarding the 2006 general election for Governor specifically, Dr. Lanier estimated that Latinos comprised between 2.6% and 4.2% of the voters who turned out that day, but Latinos cast 10.3% of ballots that went uncounted because of insufficient identification. (Ex. 886).

Regarding the 2008 presidential preference election, in a non-scientific study, Maricopa County reported, of 897 conditional provisional ballots, 739 went uncounted. (Ex. 954). Of the 739 uncounted ballots, 129, or 17%, were Latino. *Id.* Maricopa County further noted that 12% of its registered voters were Latino. *Id.*

VI. Evidence of Voter Fraud in Arizona

In 2005, Maricopa County Recorder Helen Purcell referred 159 matters to the Maricopa County Attorney Andrew Thomas based on evidence that non-citizens had registered to vote. (Osborne Dep. Ex. 3 at 4, July 31, 2006). In August 2005, Thomas announced that ten non-citizens had been charged in felony criminal complaints for falsely filing voter registration forms claiming they were in fact United States citizens, four of which had voted in an election. *Id.*

Maricopa County Elections Director Karen Osborne also testified to voter registration organizations, which are paid on a per-registration-form basis, submitting "garbage" voter registration forms and misleading non-citizen residents into registering to vote. (Osborne Dep. 16-28, 18-30, 70, Jan. 14, 2008).

In Pima and Maricopa counties, 208 individuals had their voter registrations cancelled after they swore under oath to the Jury Commissioner that they were not citizens, 56 of whom are alleged to have voted in a election. (Exs. 1108, 1351).

Pima County has also referred several instances of non-citizens either attempting to register to vote or cast votes to the Pima County Attorney. (Ex. 1108 at 2-3 & ex. A).

Yuma County Voter Registration Coordinator Krysty Marin testified that a woman who was not a citizen and who registered to vote right before the 2004 election. (Marin Dep. 98-99, 101-04, Jan. 18, 2008). Yuma County was able to identify her as a non-citizen because her license subsequently showed up as Type F. *Id.* at 98. Fortunately, she did not vote and has since cancelled her voter registration. *Id.* at 102. After talking with this woman, Marin believes she was a victim of an unscrupulous voter registration organization. *Id.* at 99, 103.

In addition, Defendants have introduced court records for nine persons prosecuted for illegal voting and presentment of false instrument for filing. Ex. 1349a-g,y-z. According to the charging papers, five of the nine were alleged to be non-citizens that had in fact voted.[15] Ex. 1349a,c,d,e,f,g. Of the five, four pleaded guilty. *Id.*

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[15] The act of registering to vote by a non-citizen is a class six felony. A.R.S. §§ 16-182, 39-161. If that person also votes, the offense is a class five felony. A.R.S. § 16-1016.

V. Plaintiffs

A. Gonzalez

i. *Individual Plaintiffs*

There are four individual plaintiffs: Jesus Gonzalez, Bernie Abeytia, Georgia Morrison-Flores, and Debra Lopez.[16] Abeytia did not testify at trial.

a. Jesus Gonzalez

Jesus Gonzalez was born in Mexico and is Latino. (Trial Tr. 221-22). He became a naturalized citizen on August 18, 2005. (*Id.*; Ex. 711). After the naturalization ceremony, he applied to register to vote using the number from his certificate of naturalization, rather than his alien registration number, as proof of citizenship, which is what the voter registration form at the time required. (Trial Tr. 222-23; Ex. 712).

His application was denied for failure to provide proof of citizenship. (Ex. 712).[17] The letter of denial specified that satisfactory evidence of citizenship included the A-number on the naturalization certificate. *Id.* Jesus Gonzalez's naturalization certificate bears a series of numbers beginning with an "A."

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[16] Naeem Abdul-Kareem, Luciano Valencia, and Maria Gonzalez were dismissed on June 27, 2008. (Doc. 883).

[17] Although the trial exhibit was in English, and Jesus Gonzalez cannot read English, he testified that the letter arrived in Spanish (for an example, see Ex. 697) and in English. (Trial Tr. 230).

(Ex. 711). In addition, attached to the letter was Jesus Gonzalez's voter registration application with his certificate of naturalization number crossed out, and a notation "A#" written above.

In October 2006, Jesus Gonzalez tried to register again online at EZ Voter Registration, https://servicearizona.com/webapp/evoter/, using his Arizona driver's license. (Trial Tr. 220, 225, 235). His application was denied because his Arizona driver's license was issued to him before October 1, 1996. *Id.* at 225.

Jesus Gonzalez has a U.S. passport, issued November 8, 2006, which he purchased for $112.95. (Exs. 709-10). He purchased the passport to travel to and from Mexico, rather than to register to vote. (Trial Tr. 232).

There is no dispute that Jesus Gonzalez possess [sic] the documentation required to establish proof of citizenship to register vote – he has a naturalization certificate with an A-number and a U.S. passport.

b. Georgia Morrison-Flores

Morrison-Flores was born in Yuma, Arizona. (Morrison-Flores Dep. 12, Jan. 17, 2008). She got married on July 5, 2003. *Id.* Prior to her marriage, her name was "Georgia Morrison-Vasquez." *Id.* at 14. She registered to vote in 2004 under the name "Georgia Flores-Morrison." *Id.* at 34, 36-38, 41-42. It appears that she accidentally filled out the form incorrectly: it should read "Georgia Morrison-Flores."

Id. at 41-42; *see also* Doc. 617, Ex. 21. There is no evidence that she has tried to correct her name on the voter rolls.

Morrison-Flores receives monthly bank statements from SunBank. *Id.* at 22-23. She also still has the voter registration card that she received from the Yuma County elections department after registering to vote in 2004. *Id.* at 41, 77. She also has received sample ballots from Yuma County. *Id.* at 65.

On November 7, 2006, she attempted to vote at her polling place using her license as proof of identification, but was not allowed to because the name on her license at the time was "Georgia Morrison-Vasquez," which did not match the name on the voter rolls, "Georgia Flores-Morrison." *Id.* at 43-44. She was not offered a provisional ballot. *Id.* at 45-46.

In April 2007, she went to an office of the MVD and updated her name in their records to reflect her married name. *Id.* at 48-49. Morrison-Flores' current drivers' license reads "Georgia Morrison-Flores." *Id.* at 51.

Morrison-Flores can correct the name on the voter rolls for free. Once she does this, she has the proof of identification required in order to vote in person on election day.

c. Debra Lopez

Lopez is a consultant, creating grass-root strategies for non-profit political and corporate clients.

(Trial Tr. 605). For example, she worked for the Latino Vote Project and the Southwest Voter Registration Education Project. *Id.* at 619. She has been registering voters since she was 18 years old, as part of her employment and on a volunteer basis, and does so every chance that she gets. *Id.* at 606. She volunteers at festivals and fiestas, and conducts impromptu registration using registration forms she keeps in her car. *Id.* She focuses on registering Latino voters. *Id.* at 607. She herself is registered to vote, and she possesses sufficient voter identification to vote in person on election day. *Id.* at 617, 618.

Prior to Proposition 200, Lopez said she could register every person that wanted to register. *Id.* at 610, 621. After Proposition 200, it is more difficult for her because people she encounters sometimes do not carry the necessary documentation on their persons. *Id.* at 612. In addition, if the documents have to be photocopied, such as a birth certificate or passport, she has to bring a photocopy machine and rent a generator to run it. Otherwise, she tries to obtain copies on the person's behalf, or to explain to the person how to obtain photocopies. *Id.* at 612-13, 623. Her personal expenditures related to Proposition 200 involved time, gas, and photocopies. *Id.* at 622-23.

She did not identify any particular individuals who cannot register due to Proposition 200.

ii. *Organizational Plaintiffs*

The Gonzalez organizational plaintiffs include: Chicanos Por La Causa, Valle Del Sol, Association of Community Organizations for Reform Now, Arizona Hispanic Community Forum, Friendly House, Project Vote, Southwest Voter Registration Education Project, and Common Cause. Only Chicanos Por La Causa and Valle Del Sol testified at trial.

a. Chicanos Por La Causa ("CPLC")

Vice President of Human Resources Salvador Martinez testified on CPLC's behalf. (Trial Tr. 551-52). CPLC is a statewide, community-based organization. *Id.* Its mission is to advocate on behalf of those individuals that are disenfranchised and to provide services for those unable to provide for themselves. *Id.* at 552. As part of that mission, it conducts voter registration, outreach, and education. *Id.* at 552-53.

Martinez testified that Proposition 200 is "somewhat burdensome" on CPLC. He stated that it has made voter registration more expensive because CPLC has to makes copies of registrants' documents, and more manpower is required. *Id.* at 554-55. In addition, Martinez testified that CPLC had to create and copy for distribution several documents because of Proposition 200 in order to educate CPLC's personnel and constituents about the new law's requirements. *Id.* at 557-58; Exs. 538, 563, 566, 569, 570. Only one of these documents, though, mentions Proposition 200's requirements. (Ex. 538).

Martinez testified that CPLC incurred $7,000 related to copying, *et cetera*, and unspecified labor costs because of Proposition 200. (Trial Tr. 566). No documentation was provided supporting these costs, nor was there evidence that these costs were due to Proposition 200, as opposed to its general voting expenditures.

When registering voters, Martinez encountered only two people who wished to register, but did not have the requisite proof of citizenship on their person. (Trial Tr. 559-60). He did not testify that they did not have proof of citizenship, merely that they did not have it with them. He instructed the first person to go home and return with the documents. *Id.* at 560. The person did not return, and Martinez does not know if he ever registered to vote. *Id.* at 561. Martinez drove the second person home to obtain the documents because that person did not have transportation. *Id.* at 560. Martinez testified that one of these persons was Latino, but did not testify whether either was a member of CPLC. *Id.* at 573.

b. Valle Del Sol ("Valle")

President and Chief Executive Officer Luz Sarmina testified on behalf of Valle. (Trial Tr. 490-91). Valle is a nonprofit community based organization, which focuses its services on the Latino community. *Id.* at 490. Its mission is to inspire positive change through its behavioral health services, family support services, and Latino leadership development

program. *Id.* at 490-91, 498. Although Valle seeks to promote civic engagement through voter registration, voter registration is not one of its core businesses. *Id.* at 492-93.

Sarmina testified that Proposition 200 has had "not a huge impact but an impact" on Valle. *Id.* at 498, 500. She stated that voter registration is more expensive post Proposition 200 because of the copying and additional staff time dedicated to training voter registrars and registrants. *Id.* at 498, 500, 514; *see also* Exs. 541-45. She also testified that, when trying to register voters, Valle has encountered people that did not have the necessary proof of citizenship on their person. (Trial Tr. 500). In such instances, Valle advised the person to get the documents and bring them back for photocopying, or, if the person did not have documentation, Valle worked with the person to try to get documentation. *Id.* at 501-02. In its interrogatory answers, Valle states that it has incurred $11,047 in costs due to Proposition 200, (Ex. 1304), but did not provide any supporting documentation at trial.

Sarmina did not testify that a member of Valle did not or does not now possess proof of citizenship.

B. ITCA

i. *Individual Plaintiff*: Representative Steve Gallardo

Representative Steve Gallardo has been a member of the Arizona House of Representatives since

2002. (Trial Tr. 175). He is the minority whip for the House Democrats, and is Latino. *Id.* at 175, 190. The district that he represents, District 13, comprises parts of the Cities of Glendale, Phoenix, Tolleson, and Avondale, and the community of Cashion. *Id.* at 175-76. The voting age population in his district is majority Latino. *Id.* at 176. Representative Gallardo is running for reelection this year for another two year term, and has qualified for the primary ballot. *Id.*

Representative Gallardo has also been an at-large member of the Phoenix Union High School Governing Board since 2004. Tr. 176-77. The high school district he represents covers the City of Phoenix, which contains over a million people, and is majority Latino. *Id.* at 177. Again, he is running for reelection this year for another four year term. *Id.* at 177-78.

Representative Gallardo was reelected to his House seat in 2006 – after the implementation of Proposition 200. *Id.* at 189. Also he testified that, as a candidate, if he wants his constituents to vote for him, he needs to notify them about the acceptable forms of identification. *Id.* at 186. He is not aware, however, of any specific person who has been unable to register to vote or that would vote for him but cannot because of Proposition 200. *Id.* at 180, 198, 201.

ii. *Organizational Plaintiffs*

The ITCA organizational plaintiffs include: Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, League of Women Voters of Arizona, Hopi Tribe, and League of United Latin American Citizens. The Hopi Tribe and the League of United Latin American Citizens did not testify.

a. Inter Tribal Council of Arizona, Inc. ("ITC")

Executive Director John Lewis testified on behalf of ITC. (Trial Tr. 443-44). ITC comprises the highest elected tribal officials of 20 of the 22 tribes located in Arizona, not including the Navajo Nation. *Id.* at 444, 447; Ex. 1190. Its purpose is to work collectively on common issues that face them as tribal governments. *Id.* at 444. As part of that purpose, ITC seeks to promote American Indian voting rights and provides voter education programs for tribe members. *Id.* at 444-45, 470-71.

He testified tribal members were less likely to possess birth certificates, especially members over the age of 40, and driver's licenses due to lack of access to health care and economic conditions. (Trial Tr. 457-60, 472-74).

Lewis said, however, that neither he nor ITC was aware of any tribal member who lacks satisfactory evidence of citizenship to register to vote. *Id.* at 486-87, 489; *see also* Ex. 1311.

b. Arizona Advocacy Network ("AzAN")

Executive Director Linda Brown testified on AzAN's behalf. (Trial Tr. 581). AzAN's mission is to promote social, economic, and environmental justice by increasing civic participation. *Id.* To advance its mission, AzAN conducts voter registration. *Id.* at 582.

AzAN is affiliated with a national group called USAction Education Fund ("USAction"), one of the nation's leading organizations in nonpartisan voter registration. *Id.* at 584. AzAN has a contract with USAction to register a certain number of voters; their current goal is 5,000 voters for the 2008 Presidential election. *Id.* at 584, 585. AzAN is paid by USAction based on the number of confirmed registrations. *Id.* at 584.

AzAN spent $19,025 in polling place monitoring over the four elections held in 2006. (Trial Tr. 588; Ex. 1223). Brown personally monitored some polling places during two elections, during which she offered voters a "voter bill of rights" drafted by AzAN, describing, among other things, the proof of identification options. (Trial Tr. 588). AzAN spent $2,298 in printing costs for the voter bill of rights. (Ex. 1223).

Brown said that, because of Proposition 200, it takes more people more time to register each voter as compared to a state without identification requirements. *Id.* at 586. For example, in AzAN's 2008 projected voter registration budget, the cost per voter registered is estimated as between $9.28 and $12.21 in Arizona, as opposed to a typical state where it is

between $7.08 and $7.81 per voter registered, which is a total cost difference of $11,000-22,000. (Ex. 1223). This reflects Brown's belief that, in Arizona, AzAN can register 6-10 persons in a four-hour shift in Arizona, as opposed to 15-20 per shift in other states. (Trial Tr. 586). As part of its efforts, AzAN also seeks to help recruit 120 poll workers for the counties and conduct supplemental training focusing on Proposition 200's requirements. *Id.* at 602.

AzAN also has projected that it will spend $40,440 on election protection efforts for the 2008 general election. *Id.* Brown projected that all of this cost is attributable to Proposition 200. (Trial Tr. 601). This testimony is not particularly reliable, however, because AzAN conducted election related efforts before Proposition 200.

While conducting registration since Proposition 200's implementation, Brown encountered four people that were unable to register because they lacked proof of citizenship on their person. *Id.* at 583-84. She did not testify whether these people were members of AzAN.

c. League of Women Voters of Arizona (the "League")

President Bonnie Saunders, Ph.D., testified on behalf of the League. (Prelim. Inj. H'rg Tr. 116, Aug. 30, 2006). One of the League's primary goals is to promote voter participation. *Id.* Prior to Proposition 200, it conducted voter registration drives at parents'

night in local schools and other venues. *Id.* at 118-21. After Proposition 200, it did not register voters, but merely passed out voter registration forms. *Id.* at 122-23. The League decided it would not take responsibility for peoples' drivers license numbers or making photocopies of other identification documents. *Id.* Saunders did not testify as to whether any member of the League did not possess proof of citizenship.

V. Defendants

Defendants comprise the State of Arizona, the Arizona Secretary of State, Jan Brewer, in her official capacity (collectively, the "State"), the County Recorder and County Director of Elections of every county in Arizona in their official capacities[18] (collectively, the "Counties"). (Doc. 352; *ITCA*, Doc. 1).

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[18] The specific persons are: Maricopa County Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne; Apache County Recorder LeNora Johnson and Apache County Elections Director Penny L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections Director Dixie Mundy; Graham County Recorder Wendy John and Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave County Recorder Joan McCall and Mohave County Elections Director Allen Tempert; Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R. Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections Director

(Continued on following page)

VI. Lay Testimony by Non-Parties

A. Maria Gonzalez

Maria Gonzalez is a former *Gonzalez* plaintiff; she was dismissed for lack of standing on June 27, 2008. (Doc. 883). She was born in Mexico, and she became a naturalized citizen on August 18, 2005. (Trial Tr. 207; Ex. 715). After the naturalization ceremony, she applied to register to vote using the number from her certificate of naturalization, rather than her A-number, as proof of citizenship, which was required by the voter registration form at the time, now amended to allow the A-number. (Trial Tr. 207; Ex. 711).

Her application was denied for failure to provide proof of citizenship. (Ex. 697). But the letter she received in Spanish and English specified satisfactory evidence of citizenship included the "A-number" on the naturalization certificate. *Id.* Maria Gonzalez's naturalization certificate bears a series of numbers beginning with an "A." (Ex. 715). In addition, attached to the letter was Maria Gonzalez's voter registration application with her certificate of naturalization number crossed out, and a notation "A#" written above." (Ex. 697).

Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill.

In October 2006, Maria Gonzalez attempted to register again at EZ Voter Registration, https://servicearizona.com/webapp/evoter/, using her Arizona driver's license issued in 2005, and was successful. (Trial Tr. 214, 219-20). Thus, she is registered to vote in the 2008 Presidential election.

B. Agnes Laughter

Agnes Laughter is a former *Navajo Nation* plaintiff, which case was dismissed by stipulation on May 27, 2008. (Doc. 775). She was born Jane Begay in Chilchinbeto, located on the Navajo Nation reservation in Arizona. (Laughter Dep. 9, Oct. 19, 2006). She was born at home in a hogan, and is 74 years old. *Id.* She is now registered to vote, *id.* at 14-15, and has a certificate of Indian blood and a bank statement as voter identification. (Doc. 435, Ex. 9). Therefore, Laughter can vote in person on election day.

C. Shirley Preiss

Shirley Preiss, who, by stipulation, is not Latina, was born Shirley Meshew on August 17, 1910 in Clinton, Kentucky. (Trial Tr. 82; 89-90). She was born at home rather than a hospital, and was not issued a birth certificate. *Id.* at 83. She did not testify that she is American Indian.

Preiss moved to Arizona about three years ago. *Id.* at 84. She is cared for by her son and has made efforts to register to vote in Arizona, but has been

unsuccessful because she does not possess the proof of citizenship required by Proposition 200. *Id.* at 87. She has tried to obtain a delayed birth certificate from Kentucky, but has also been unsuccessful in this pursuit. *Id.* at 83. She does not have an Arizona driver or nonoperating license, nor a passport. *Id.* at 87, 88.

D. Donna Fulton

In late 2007, Fulton moved from Safford, Arizona in Graham County, where she was a registered voter, to Eloy, Arizona in Pinal County. (Ex. 968). She did not testify whether she is either Latina or Native American. In December 2007, she completed a new voter registration form and mailed it to the Pinal County Recorder's Office. *Id.*

On February 5, 2008, Fulton attempted to vote in the Presidential preference primary election, but the poll worker could not find her name on the Pinal County voter roll. *Id.* After showing proof of identification with her current address, Fulton cast a conditional provisional ballot. *Id.* She reports that the poll worker did not instruct her to return to the County Recorder's Office to provide her identification again. *Id.*

Approximately one month after the election, Fulton received a letter in the mail stating that her ballot was not counted because she failed to provide proof of citizenship. *Id.*

Assuming the veracity of Fulton's testimony, County Defendants state that Fulton should have been issued a provisional ballot, rather than a conditional provisional ballot, and her ballot was improperly not counted. (Doc. 1031, at 4).

E. Brenda Rogers

Rogers lives on the Gila River Reservation, and is registered to vote in Pinal County. (Ex. 967). She did not testify whether she is either Latina or Native American. Rogers' driver's license does not reflect her current address. *Id.* Although her home does not have a street address, her registered voter address is Gila River Dist 4B, Sacaton, Arizona 85247. *Id.* Rogers receives mail at P.O. Box 13493, Chandler, Arizona 85248, which is also on her voter record.

On February 5, 2008, Rogers says she attempted to vote in the Presidential preference primary election. *Id.* She showed her voter registration card and driver's license. *Id.* The poll workers found her on the voter rolls but said that she had to vote a conditional provisional ballot because the address on her driver's license did not match her registered voter address. *Id.* Rogers cast a conditional provision ballot. *Id.*

Assuming the veracity of Rogers's testimony, County Defendants state that Rogers should have been issued a provisional ballot, rather than a conditional provisional ballot, and her ballot was improperly not counted. (Doc. 1031, at 4).

STANDARD OF REVIEW

To secure a permanent injunction, "[a] plaintiff must demonstrate: (1) [ ] it has suffered an irreparable injury; (2) [ ] remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) [ ] considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) [ ] the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1839 (2006). This burden must be demonstrated by a preponderance of the evidence. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998).

LEVEL OF SCRUTINY FOR CONSTITUTIONAL CLAIMS

I. Constitutional Challenges to Election Laws Generally

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U. S. 428, 433 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 184 (1979)). Nonetheless, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer v. Brown*, 415 U. S. 724, 730 (1974)); *see also* U.S. Const. Art. I, § 4, cl. 1 ("The times, places and manner of holding elections for Senators and

Representatives, shall be prescribed in each state by the legislature thereof. . . ."). "This [regulatory] power is not absolute, but is subject to the limitation that [it] may not be exercised in a way that violates . . . specific provisions of the Constitution.'" *Wash. State Grange v. Wash. State Republican Party,* 128 S. Ct. 1184, 1992 (2008) (quoting *Williams v. Rhodes,* 393 U.S. 23, 29 (1968)).

Because of these competing interests, the Supreme Court has adopted a sliding-scale balancing approach for analyzing election laws. *Crawford v. Marion County Election Bd.,* 128 S. Ct. 1610, 1615-16 (2008); *id.* at 1624-25 (Scalia, J., concurring); *id.* at 1628 (Souter, J., dissenting); *Wash. State Grange v. Wash. State Republican Party,* 128 S. Ct. 1184, 1191 (2008). Election regulations that impose a severe burden on constitutional rights are subject to strict scrutiny. *Wash. State Grange,* 128 S. Ct. at 1191. "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Id.* (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). That said, if the state's interest is unrelated to voter qualifications, the regulation likely will be struck down no matter how slight its burden. *See Crawford,* 128 S. Ct. at 1615-16; *Harper v. Va. Bd. of Elections,* 383 U.S. 663 (1966).

Finally, in applying this approach, the Court is reminded, "since the right to exercise the franchise in a free and unimpaired manner is preservative of

other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U. S. 533, 562 (1964).

II. Facial Versus As Applied Constitutional Challenges

Whereas a facial challenge seeks to invalidate a statute in all of its applications, an as applied challenge argues that the law is unconstitutional as applied to the plaintiff even though the law may be capable of valid application to others. *See Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998) (discussing the difference between facial and as applied challenges).

Although the standard to be applied to a facial challenge is a subject of debate among the Justices of the Supreme Court, they do agree "a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Crawford,* 128 S. Ct. at 1623 (quoting *Washington State Grange,* 128 S. Ct. at 1190).

ANALYSIS

I. Equal Protection: Undue Burden on the Fundamental Right to Vote

Plaintiffs, except the Hopi Tribe and ITC, assert Proposition 200's proof of citizenship and identification provisions impose an unconstitutional burden on the fundamental right to vote. The Hopi Tribe and

ITC only challenge the proof of citizenship provision. ITCA Plaintiffs' claims are facial and as-applied challenges, while Gonzalez Plaintiffs' claims are as-applied challenges only.

A. Strict Scrutiny is Not Appropriate.

Strict scrutiny of Proposition 200 is not warranted because Plaintiffs have failed to demonstrate that the character and magnitude of the asserted injury excessively burdens the right to vote.

i. The Burden on Naturalized Citizens Is Not Excessive.

Gonzalez Plaintiffs assert that naturalized citizens suffer an excessive burden under Proposition 200 because they have to "register twice or appear in person at the Recorder's Office to register to vote." (Doc. 1033, at 6). To the extent that some applicants had to register twice immediately following Proposition 200's implementation when they used their naturalization certificate number to provide proof of citizenship, current and future applicants do not.

Proposition 200 allows applicants to use "the number of the certificate of naturalization" to register. A.R.S. § 16-166(F)(4). There are two numbers on a certificate of naturalization, however: (1) a number with the heading "No."; and (2) a number with the heading "INS Registration No.," which begins with the letter A. No system exists, on the federal or state level, to verify the former. There is a federal system

in place, SAVE, that verifies the latter. Given the clear requirement of Proposition 200 to verify "the number" with USCIS, *id.*, election officials reasonably interpreted Proposition 200 to require an applicant to provide the A-number. *See* A.R.S. § 1-221(B) ("Statutes shall be liberally construed to effect their objects and to promote justice."); *Berger v. City of Seattle,* 512 F.3d 582, 597 (9th Cir. 2008) ("We give due consideration to the government's interpretation and past application of its rule.").

Prior to realizing that the number with the heading "No." is not verifiable, the voter registration forms revised immediately following Proposition 200's implementation asked for the certificate of naturalization number. As a result, some applicants, such as Maria and Jesus Gonzalez, who correctly filed [sic] out their voter registration form by providing the number beginning with "No." were denied registration, and they had to try to register a second time.

The registration form, however, has now been revised to clearly require the A-number, which is verifiable. Thus, although some applicants unfortunately had to register twice immediately following Proposition 200's implementation, current and future applicants will not suffer the same impediment in the upcoming 2008 election. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983) (noting that a prospective injunction requires the threat of future harm). Again, a "[plaintiff] must show a very significant possibility of future harm because he seeks injunctive relief." *Mortensen v. County of Sacramento,* 368 F.3d

1082, 1086 (9th Cir. 2004) (internal quotation marks omitted).

Moreover, if a newly naturalized citizen uses a Type F license to register to vote and is required to provide additional proof of citizenship, the applicant merely has to file a new form to register using his or her A-number. While inconvenient, this is hardly a severe burden. As the Supreme Court recently explained, "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *See Crawford*, 128 S. Ct. at 1621.

Further, a naturalized citizen does not have to appear in person at the Recorder's Office to register to vote. An applicant may provide a license number, a photocopy of a U.S. passport, or an A-number to register without appearing in person.

In addition, if the applicant elects to forgo these options and to instead use the certificate of naturalization form to register to vote, several counties accept photocopies of naturalization certificates. (*See* Dean-Lytle Dep. 53, Jan. 16, 2008 (Pinal County); Marin Dep. 112, Jan. 18, 2008 (Yuma County); Osborne Dep. 38-39, Jul. 1, 2006 (Maricopa County); Hansen Dep. 27, Aug. 1, 2006 (Coconino County); Rodriguez Dep. 63, Aug. 2, 2006 (Pima County)). Contrary to Plaintiffs' assertion, accepting a photocopy of a

naturalization certificate is not forbidden by the Manual. (*See* Ex. 4, at 48). The Secretary of State's representative, Joseph Kanefield,[19] specifically testified that a county recorder is not violating the Manual by accepting photocopies. (Trial Tr. 756). Accordingly, it is the applicant's choice to travel to the county recorder to present a naturalization certificate.

Naturalized citizens do not suffer an excessive burden due to Proposition 200.

ii. The Burden on Arizona Citizens as a Whole Is Not Excessive.

Of the approximately 20,000 voters ultimately unable to register to vote due to Proposition 200's proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it. *See Crawford,* 128 S. Ct. 1620 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that

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[19] Joseph Kanefield is the Director of the Election Services Division of the Secretary of State's office. (Trial Tr. 644). His testimony both at trial and deposition demonstrates the significant efforts the Secretary of State's office has taken to liberally construe questions raised regarding the right of an elector to vote in favor of allowing the elector to vote.

complies with the requirements of [the voter identification statute."). Indeed, they have only produced one person, Shirley Preiss, who is unable to register to vote due to Proposition 200's proof of citizenship requirement. Nor have they demonstrated that the persons rejected are in fact eligible to register to vote.

Regarding Proposition 200's proof of identification requirement, Plaintiffs have not produced a single person who lacks proof of identification. In addition, individuals who lack proof of identification may vote early without providing identification, even on the day of the election itself.

Of the over 3 million ballots cast in the 2006 primary, 2006 general, and the 2008 Presidential preference elections, only 4,194 ballots, or 0.13%, were uncounted due to lack of proof of identification. County Defendants have admitted, two of these ballots, Fulton and Rogers, went uncounted by mistake, but Plaintiffs have not presented any evidence that the remaining 4,192 persons were in fact eligible to vote.[30]

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[30] Although that Defendants admit that mistakes occurred and can occur in applying Proposition 200 at the polls, especially when it was new, they endeavor to "make it very clear to poll workers that under no circumstances is someone ever to be turned away from the polls without voting." (Trial Tr. 728). In addition, if it was brought to their attention that a poll worker misunderstood or was misapplying Proposition 200's requirements, they quickly tried to remedy the problem. *Id.*; Ex. 409.

Very recently, in *Crawford*, the Supreme Court found that Indiana's voter identification law did not deserve strict scrutiny. 128 S. Ct. at 1623. Plaintiffs seek to distinguish *Crawford* on the grounds that the plurality stated: "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification," essentially a poll tax. *Id.* at 1620-21. *Harper* involved a poll tax unrelated to voter qualifications and is distinguishable. 383 U.S. at 666. Proposition 200's requirements go directly to voter qualifications: whether a registrant is a U.S. citizen, and whether an in person voter is who he or she says he or she is. Moreover, as the dissent in *Crawford* noted, the "free" identification provided by Indiana is a hollow promise, as obtaining the documents necessary to get the "free" identification require the payment of a fee. *See* 128 S. Ct. at 1631. The Court is bound by the Ninth Circuit's holding on appeal of this case that Proposition 200 is not a poll tax even though some Arizonans may be required to spend money to obtain necessary documents.[21] *Gonzalez*, 485 F.3d at 1048.

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[21] The Court is also bound by its prior holding that Proposition 200 does not constitute a poll tax. *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) ("Under the law of the case doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case."); Docs. 611 & 330.

Proposition 200's burden on Arizona citizens as a whole is not excessive.

* * *

Because neither the burden on naturalized citizens nor Arizonans generally is excessive, Plaintiffs' challenges are not subject to strict scrutiny. *See id.* at 1623.

B. Defendants' Interests in Prevention of Voter Fraud and Maintaining Voter Confidence in the Electoral System Are Important.

Defendants have asserted two interests to justify Proposition 200's burden on voters and potential voters: (1) prevention of voter fraud; and (2) maintaining voter confidence.

a. Voter Fraud

Although an evidentiary showing of fraud is not required to find a government's interest in preventing voter fraud to be important, *id.* at 1617 (deterring in person voter fraud an important state interest despite no evidence of fraud occurring in Indiana), the Defendants demonstrated instances of voter fraud in Arizona. *See supra,* Section V. In addition, in *Crawford,* the Supreme Court detailed examples of voter fraud in other states, supporting Defendants' assertion that voter fraud is a legitimate and real concern. 128 S. Ct. at 1619.

As the Supreme Court explained:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id.; *see also Purcell*, 549 U.S. at 7 ("A state indisputably has a compelling interest in preserving the integrity of its election process.").

Defendants' interest in preventing voter fraud is an important governmental interest in Arizona.

b. Voter Confidence

Defendants also assert that they have an interest in protecting voter confidence in the electoral system. "While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 1620; *see also Purcell*, 549 U.S. at 7 ("Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.").

Defendants' interest in protecting voter confidence is an important governmental interest in Arizona.

C. Defendants' Important Interests Outweigh the Modest Burden on the Right to Vote Imposed by Proposition 200.

Because Plaintiffs have not demonstrated that Proposition 200 is excessively burdensome, "the State's important regulatory interests are [] sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Wash. State Grange,* 128 S. Ct. at 1191 (internal quotation marks omitted); *see also Crawford,* 128 S. Ct. at 1623.

Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots. *See* Commission on Federal Election Reform, Report, Building Confidence in U.S. Elections 18 (Sept. 2005) ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or confirm the identity of voters."). As such, Plaintiffs' challenge must fail. *See Crawford,* 128 S. Ct. at 1623; *id.* at 1627 (Scalia, J., concurring in the judgment).

II. Equal Protection: Discrimination Against Naturalized Citizens

Gonzalez Plaintiffs contend Proposition 200's proof of citizenship requirement violates the Equal Protection Clause by discriminating against naturalized

citizens. To establish an equal protection claim for discrimination, "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001). To show intentional discrimination, "a plaintiff must establish that 'the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985)); *see also Thornton v. Ctiy* [sic] *of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) ("Mere indifference to the effects of a decision on a particular class does not give rise to an equal protection claim.").

Gonzalez Plaintiffs offer only three facts to show discriminatory intent.[22] First, Proposition 200's "findings and declaration" state:

> This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide

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[22] Although the admitted exhibits showed that, as anticipated problems, surfaced regarding Proposition 200's implementation, the response by the State and County Defendants was consistent and immediate. There is no evidence of a purposeful misapplication of Proposition 200's requirements or and [sic] intent to discriminate in its application.

> public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Ex. 1. Second, Proposition 200 allows photocopies of an applicant's birth certificate and passport, but not certificate of naturalization. *Id.* And third, Proposition 200 states, "if only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate is verified. . . ." *Id.*

However, these facts do not establish intentional discrimination by a preponderance of the evidence. Proposition 200's findings and declaration does not demonstrate that the voters in Arizona approved Proposition 200 because of its adverse effects upon naturalized citizens. Rather, the findings and declaration shows a concern with illegal immigrants, not with naturalized citizens. Moreover, unlike a finding or declaration in a bill vetted by Congress, Arizona voters did not have any input into its specific language, which weakens its evidentiary value as to the

electorate's intent. *Cf. Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 312-13 (2006) (Souter, J., dissenting) (arguing that when members of the House and Senate met in conference to work out differences and then produced a joint conference report that was subsequently adopted by the Senate and House, it is probative of Congress's intent).

The second fact also fails to establish that Arizona voters approved Proposition 200 because of its adverse effects upon naturalized citizens. An applicant need only present the certificate of naturalization in person if the applicant chooses not to write down the A-number on the voter registration form. In fact, federal law criminalizes the photocopying of certificates of naturalization without lawful authority. 18 U.S.C. § 1426(h).[23]

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[23] 18 U.S.C. § 1426 (h) provides:

> Whoever, without lawful authority, prints, photographs, makes or executes any print or impression in the likeness of a certificate of arrival, declaration of intention to become a citizen, or certificate of naturalization or citizenship, or any part thereof – Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

Finally, Plaintiffs argue that the third fact evidences discriminatory intent because "only naturalized citizens are subject to third-party verification." (Doc. 1029, at 4). This is not strictly true because naturalized citizens can use their driver's license or passport to register to vote, and, if they present their naturalization certificate in person, verification is not required.[24]

Importantly, the Help America Vote Act already requires Arizona driver's licenses to be verified, so there was no need to so specify in the text of Proposition 200. *See* 42 U.S.C. § 15483(b)(5). And, indeed, when an applicant provides a license number, the application is not included on the voter rolls until the license is verified using Arizona's online system. (Trial Tr. 655-56).

Of course, alien registration numbers have to be verified with a third party – the federal government is the only entity that possesses such information. In contrast, county recorders can verify Arizona driver's licenses using their own system, which has not been proven to be unreliable.

Moreover, applicants who wish to use their certificate of naturalization have more options than

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[24] For example, the counties often, if not always, attend naturalization ceremonies. If a naturalized citizen seeks to register after the ceremony and presents his or her naturalization certificate as proof of citizenship, the document is accepted on its face, and no further verification with USCIS is required.

applicants who use birth certificates or passports. Applicants who rely on a birth certificate or passport as proof of citizenship do not have the option of merely providing a number, but must incur the cost of photocopying the birth certificate. However, persons with a certificate of naturalization are allowed to prove citizenship by either: (1) presenting the actual certificate of naturalization, or (2) submitting the number on the naturalization certificate, subject to verification.

The purpose of Proposition 200 – preventing voter fraud and enhancing voter confidence – would be frustrated if naturalization numbers submitted without documentary proof were not subject to verification.

Thus, regardless of the standard of scrutiny, because Gonzalez Plaintiffs have failed to establish intentional discrimination, they have not proved that Proposition 200's proof of citizenship requirement violates the Equal Protection Clause by discriminating against naturalized citizens.

III. First Amendment

Gonzalez Plaintiffs assert that Proposition 200's proof of citizenship requirement, as applied, curtails their speech and associational rights in violation of the First Amendment by making it harder and more expensive to register people to vote.

There is no question that voter registration efforts are protected by the First Amendment. *See Bernbeck v. Moore*, 126 F.3d 1114, 1117 (8th Cir. 1997); *Monterey County Democratic Cent. Comm. v. U.S. Postal Service*, 812 F.2d 1194, 1196 (9th Cir. 1986); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006). As the Supreme Court explained in *McConnell v. Federal Election Commission*:

> Common sense dictates . . . that a [group]'s efforts to register voters sympathetic to that [group] directly assist the [group]'s candidates for federal office. . . . It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls.

540 U.S. 93, 167-68 (2003) (citations omitted).

Proposition 200, however, does not regulate voter registration organizations, and Plaintiffs are still able to disseminate their views to the public without restriction. Accordingly, Proposition 200 does not "necessarily reduce[ ] the quantity of expression." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *see also Meyer v. Grant*, 486 U.S. 422-23 (1988).

Importantly, none of the Gonzalez Plaintiffs testified that Proposition 200 is a severe burden on their First Amendment rights. (*See* Trial Tr. 554-55 (Proposition 200 is "somewhat burdensome on CPLC"); *id.* at 514 (Proposition 200 has "not [had] a huge impact" on Valle)).

Because Proposition 200 imposes only a modest burden on Gonzalez Plaintiffs' First Amendment rights, Defendants' important regulatory interests, discussed *supra*, Part I(B), are sufficient to justify the asserted burden.

IV. Section 2 of the Voting Rights Act

Gonzalez and ITCA Plaintiffs allege Proposition 200 violates Section 2 of the Voting Rights Act ("VRA") by abridging Latino voters' right to vote. In addition, ITCA Plaintiffs allege that it also abridges the rights of American Indians.

Section 2 of the Voting Rights Act provides in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection

> (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

42 U.S.C. § 1973.

Thus, to establish a Section 2 claim, a plaintiff must show that its members have less opportunity to: (1) participate in the political process; and (2) elect representatives of their choice. *Chisom v. Roemer*, 501 U.S. 380, 396 (1991).

The challenged voting practice need only result in discrimination on account of race. *Farrakhan v. Washington*, 338 F.3d 1009, 1015 (9th Cir. 2003); *see also Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). A plaintiff need not demonstrate discriminatory intent. *Farrakhan*, 338 F.3d at 1014 ("Congress amended Section 2 of the VRA in 1982 to relieve plaintiffs of the burden of proving discriminatory intent."); *Smith v. Salt River Project Agr. Imp. and Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent.").

In analyzing whether Section 2 has been violated, the Court may consider:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or

otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

> (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Farrakhan, 338 F.3d at 1015 (quoting S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07) (the "Senate Factors"); *see also Gingles*, 478 U.S. at 36-37.

This list is not exclusive, nor do "any particular number of factors [need to] be proved, or [ ] a majority of them point one way or the other." *Farrakhan*, 338 F.3d at 1015 (quoting S. Rep. No. 97-417 at 29). Rather, "courts must consider how the challenged practice 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). "[A] voting practice or procedure violates the VRA when a plaintiff is able to show, based on the totality of the circumstances, that the challenged voting practice results in discrimination on account of race." *Id.* at 1017 (emphasis in original omitted).

A. Latino Voters

i. *Statistical Evidence of Disparate Impact*

Taking all of the expert testimony into consideration, Plaintiffs have not demonstrated that Proposition 200 had a statistically significant impact. It is true that the percent of Latino voter registration applicants rejected was 2.8% higher than their representation in total number of registration applicants, 19.8% of those ultimately unable to register to vote were Latino, and the percent of Latino votes that go uncounted is higher than their representation in the number of voters casting ballots.

Despite this seeming disparity, even if everyone prevented from registering by Proposition 200 was allowed to register, the percentage of the electorate that was Latino would only increase by 0.1%, and the difference in Latino turnout in the 2006 general election for Secretary of State would have been even less, 0.06%. Further, although the drop in Latino registration rates was 0.92% more than the drop in non-Latino registration rates following Proposition 200, this could have been driven, at least in part, by the lower Latino population growth in 2005-2006.

Dr. Zax credibly testified that these differences were not nearly large enough to be statistically significant. (Trial Tr. 800-03). This is especially true in light of the fact that the Passel-Word List, while a good estimate, is merely an estimator of Latino descent. *Id.* at 801. Thus, when one considers the

uncertainty as to the actual number of Latinos, minute differences of less than one-tenth of one percent are subsumed by the uncertainty associated with the original identification of who is and is not Latino. *Id.*

Thus, examining the facts as a whole, Proposition 200 does not have a statistically significant disparate impact on Latino voters.

ii. *Senate Factors*

Factors not considered because no evidence was presented at trial are: use of voting practices for discrimination; candidate slating process; racial appeals during political campaigns; lack of responsiveness; and tenuousness of the voting practice.

a. History of Discrimination

Plaintiffs expert, Dr. Arturo Rosales, testified to the history of discrimination against Latinos in Arizona from before statehood to the 1970's, and as to one court case in the 1990's. (Trial Tr. 264). Defendants do not contest these facts. Dr. Rosales concluded that discrimination against Latinos in Arizona has historically hindered their ability to fully participate in the political process. (Trial Tr. 363). The Court agrees.

From the beginning of Arizona's territorial history, Mexicans were excluded from the political process and discriminated against. (Trial Tr. 353-55). While

still a U.S. territory, Arizona legislators adopted constitutional codes that restricted electoral eligibility requirements that allowed only white males and white Mexican males, a vast minority, to vote. *Id.* at 354.

Just prior to 1910, Arizona voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English speakers from voting in state elections. *Id.* at 353-54. As late as 1960's, these literacy requirements were a precondition to voter registration in Arizona. *Id.*

After Arizona attained statehood in 1912, there was an anti-immigrant campaign characterized by increasingly racist rhetoric and a series of proposals restricting Mexican immigrants' political rights and the right to work in Arizona. *Id.* at 359-60. The new Arizona constitution restricted non-citizens from working on public projects. *Id.* at 361-62. And, in 1914, the legislature enacted the "eighty percent law," which stated that eighty percent of the employees in businesses that had five or more employees had to be "native-born citizens of the United States." *Id.* Employment discrimination continued throughout various sectors of the Arizona economy. *Id.* at 360-61. As recently as the 1990's in Tempe, Mexican-Americans brought a successful federal lawsuit in which they alleged systematic racial discrimination in employment practices against the City of Tempe. *Id.*

Latinos have also suffered a history of segregation. After World War II, Phoenix segregated Mexican

American veterans in separate housing units. *Id.* at 362. Segregation of Latinos also occurred in schools, housing, theaters, swimming pools, parks, and restaurants. *Id.* Even after Mexican parents began to challenge school segregation successfully in court, school districts failed to comply with integration rulings. *Id.* at 357-58. Dr. Rosales credibly testified that segregation persists due to a lack of funding for English Language Learner programs. *Id.* at 358-59.

b. Current Demographic and Socioeconomic Statistics

Plaintiffs' expert, Dr. Jorge Chapa, testified to current demographic and socioeconomic statistics in Arizona. In 2006, Arizona's total population was 6,166,318, and its citizen voting age population ("CVAP") was 3,973,912. (Ex. 862, Tables 1, 3). Approximately one-third of Arizona's total population was Latino, and 17% of Arizona's CVAP was Latino. *Id.* at Tables 1, 9e.

Between 2000 and 2006, Arizona's CVAP grew by 17.3%. *Id.* at Table 9e. Between 2000 and 2004, the Latino CVAP grew at a rate of 16.7%, and white, non-Latino CVAP at 4.55%. (Trial Tr. 55-65). Between 2005 and 2006, the Latino CVAP grew at a rate of 4.62%, and non-Latinos at 5.82%. *Id.*

As of 2006, Latinos had lower levels of education when compared to white non-Latinos. (Ex. 862, Tables 6a, 6b; Trial Tr. 41-42). The average personal

income of Latinos was also lower than white, non-Latinos. (Ex. 862, at Table 7 (Latino: $25,433; White, non-Latino: $37,843)).

In addition, as of 2004, the Latino voter registration rate is 56%, compared to 76% for white, non-Latinos. *Id.* at Table 8a. The percent of Latino citizens who voted is also lower compared to white, non-Latinos, 47% and 70%, respectively. *Id.* Dr. Chapa testified that there is a widely held belief that lower socioeconomic status is associated with lower rates of political participation. (Trial Tr. 43-44).

There are socioeconomic disparities between Latinos and white, non-Latinos, which hinders Latinos' ability to participate effectively in the political process.

c. Racially Polarized Voting

Dr. Engstrom analyzed ten racially contested (Latino versus non-Latino) elections held in Arizona since 2002 to determine whether voting is racially polarized. (Trial Tr. 99). "Elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." *Old Person v. Cooney,* 230 F.3d 1113, 1123-24 (9th Cir. 2000); *see also Gingles,* 478 U.S. at 80-82 (relying exclusively on interracial legislative contests to determine whether a legislative redistricting plan diluted the black vote); *United States v. Blaine County, Mont.,* 363 F.3d 897, 911 (9th Cir. 2004) (contests

between white and American Indian candidates are most probative of bloc voting).

Dr. Engstrom used three standard methodologies to measure racially polarized voting: ecological regression; homogeneous precinct analysis; and ecological inference. *Id.* at 100-02; *see also United States v. City of Euclid*, No. 1:06cv01652, 2008 WL 1775282, at *10, 13 (N.D. Ohio Apr. 16, 2008) (approving the use of these methods); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1001-04 (D.S.D. 2004) (same) (collecting cases).

He analyzed four races in the 2002 Democratic primary; three in the 2004 general election; and three in the 2006 general election. (Ex. 872, Table). In the 2002 Democratic primary elections, all four races demonstrated racially polarized voting. *Id.* at 124-25; Ex. 872, Table. In these elections, however, at most 10% of the total electorate voted. (Trial Tr. 153-54).

In 2004 general election, the Latino-preferred candidate won two out of three elections. *Id.* at 164. The Latino candidate also received a majority or near-majority of the non-Latino votes in two out of three races. (Ex. 872, Table). While Representative Pastor commanded a majority of the non-Latino vote, Representative Grijalva obtained a near-majority: 49.4% of the non-Latino vote according to ecological inference, 48.4% according to ecological regression, and 56.4% according to homogeneous precinct analysis. *Id.*

In 2006 general election, after the implementation of Proposition 200, the Latino preferred candidate again won two out of three elections. (Trial Tr. 164). The Latino candidate again received a majority of the non-Latino votes in two out of three races. (Ex. 872, Table). Representative Pastor again commanded, by a large margin, a majority of the non-Latino vote. *Id.* Receiving increased support amongst non-Latinos, Grijalva also commanded a majority of the non-Latino vote. *Id.*

Dr. Engstrom concluded that Latinos voters prefer Latino candidates. (Trial Tr. 120-21). With some significant exceptions, he also testified that this preference for Latino candidates is not shared by non-Latino voters. *Id.* at 121. These exceptions include U.S. Representatives Ed Pastor and Raul Grijalva. *Id.* Dr. Engstrom attempted to explain the reason for these exceptions was that they were Latino incumbents in Latino-majority districts. *Id.* at 122, 123; *see also Gingles,* 478 U.S. at 57 (incumbency is a special circumstance that may explain minority electoral success in an otherwise racially polarized electorate).

Defendants contend Plaintiffs have not established racially polarized voting because the Latino candidates fared better than the non-Latino candidates in two-thirds of the general elections both before and after Proposition 200. *See Bone Shirt,* 336 F. Supp. 2d at 1010 ("In order for white bloc voting to be legally significant, [ ] it ha[s] to be high enough to '*normally* defeat the combined strength of minority

support plus white crossover votes.'" (quoting *Gingles*, 478 U.S. at 56)) (emphasis added).

However, the racially-polarized voting inquiry centers around districts with a non-Latino majority. *See Old Person*, 230 F.3d at 1122 (holding that the district court erred by failing to draw a distinction between majority-minority and majority-white districts in determining racial polarization). "To do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-[minority] districts." *Id.*

Examining Latino candidates' performance in majority non-Latino districts in the 2004 and 2006 general elections, the Latino preferred candidate lost both times. (Ex. 872, Table).

The Court finds that to some degree there continues to be to some racially polarized voting in Arizona.

d. Latinos Elected to Public Office

As of 2007, there were 354 elected Latino officials in Arizona. (Trial Tr. 202-03).

ii. *Causation*

Although Plaintiffs have demonstrated, at best, limited statistical disparity and some of the Senate

Factors, their Section 2 claim must fail because they have failed to demonstrate causation.

To establish a Section 2 claim, Plaintiffs must establish the Proposition 200 results in discrimination "on account of race or color." 42 U.S.C. § 1973. A mere statistical disparity in impact is not sufficient enough. *Smith v. Salt River Project Agr. Improvement and Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.") (collecting cases). "Instead, Section 2 plaintiffs must show a *causal connection* between the challenged voting practice and a prohibited discriminatory result." *Id.* (emphasis added).

Under the totality of the circumstances, Plaintiffs have failed to demonstrate that Proposition 200 interacts with social and historical conditions to deny Latino voters equal access to the political process and to elect their preferred representatives. In particular, Plaintiffs have not adduced any evidence that the observed difference in voter registration and voting rates of Latinos is substantially explained by race, as opposed to factors independent of race. *See Salt River*, 109 F.3d at 591. Not a single expert so testified.

Because Plaintiffs have not established that the statistically disproportionate impact suffered by Latinos is on account of race or color, Proposition 200 does not violate Section 2 of the Voting Rights Act.

B. American Indian Voters

i. *Statistical Evidence of Disparate Impact*

Plaintiffs did not provide any statistical evidence of a disparate impact on American Indian voters.

ii. Senate Factors

Factors not considered because no evidence was presented at trial are: use of voting practices for discrimination; racially polarized voting; candidate slating process; racial appeals during political campaigns; lack of responsiveness; and tenuousness of the voting practice.

a. History of Discrimination

Lewis testified, and Defendants do not dispute, that American Indians have suffered a history of discrimination in Arizona. And the Court so finds.

American Indians were not recognized as citizens until 1924. Indian Citizenship Act of 1924, 8 U.S.C. § 1401. And they did not win the right to vote until 1948. (Trial Tr. 445-46 (citing *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948)).

Again, from 1909 until banned by the Voting Rights Act Amendments of 1970, Arizona had a literacy test for voting. (Trial Tr. 354). Arizona also held English-only elections until the state became

covered by the language minority provisions of the VRA. *Id.*

b. Current Socioeconomic Statistics

The Court finds there are substantial socioeconomic disparities between American Indians and the Arizona population as a whole, which hinders American Indians' ability to participate effectively in the political process.

As of 2000, 13.9% of Arizonans lived below the poverty line, compared to 38% of the American Indian population. (Trial Tr. 461; Ex. 1197-98). The median household income for all Arizona was $40,388, compared to $23,709 for the American Indian population. *Id.*

Among those 18 and over in Arizona, 7.6% had not completed the ninth grade, compared to 30.2% of the American Indian population. *Id.*

Among all households in Arizona in 2000, 7.4% had no vehicle available, while 20.3% of American Indian households did not. (Ex. 1198).

c. American Indians Elected to Public Office

As of 2007, there were 54 elected American Indian officials in Arizona. (Trial Tr. 202-03).

iii. *Causation*

Under the totality of the circumstances, Plaintiffs have failed to demonstrate that Proposition 200 interacts with social and historical conditions to deny American Indian voters equal access to the political process and to elect their preferred representatives. Therefore, they have not established a Section 2 violation.

V. Title VI of the Civil Rights Act of 1964

Gonzalez Plaintiffs assert Proposition 200's proof of citizenship requirement violates Title VI of the Civil Rights Act by discriminating against naturalized citizens. Title VI provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

To establish a claim under Title VI, a plaintiff must prove that the challenged law intentionally discriminates on the basis of race or national origin. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (it is "beyond dispute" that "§ 601 prohibits only intentional discrimination"); *Alexander v. Choate*, 469 U.S. 287, 293 (1985) ("Title VI itself directly reach[es] only instances of intentional discrimination."). There is no

private cause-of-action for mere disparate treatment. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177-78 (2005); *Sandoval*, 532 U.S. at 285.

As discussed *supra*, Section II, Gonzalez Plaintiffs have failed to demonstrate intentional discrimination. Therefore, they have not established a violation of Title VI.

Accordingly,

IT IS ORDERED the Clerk of Court shall enter judgment on behalf of the Defendants.

IT IS FURTHER ORDERED this case shall be terminated.

DATED this 20th day of August, 2008.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

Nos. 08-17094, 08-17115

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS M. GONZALEZ; *et al.* Plaintiffs-Appellants, v. STATE OF ARIZONA; *et al.* Defendants-Appellees.	On appeal from the United States District Court for the District of Arizona No. CV-06-01268-PHX-ROS No. CV-06-01362-PHX-ROS

SUPPLEMENTAL EXCERPTS OF RECORD IN APPEAL NO. 08-17094 OF DEFENDANT-APPELLEES STATE OF ARIZONA AND ARIZONA SECRETARY OF STATE KEN BENNETT

* * *

INDIVIDUALS WHO HAVE INDICATED TO JURY COMMISSIONER THEY ARE NOT U.S. CITIZENS

NAME	ADDRESS	CITY	ZIP	PHONE	BIRTH PLACE	ELECTIONS VOTED
Foreign Birth Place and Voted						
Patricia Castro Porter	REDACTED	Tucson	85713		Mexico	1984, 1986, 1988 (2), 1990 (2)
Calogero Lomonaco		Tucson	85730		Italy	1992, 1996
Astrid Zulema Alvarez		Tucson	85713		Guatemala	1996
Guillermo Sarnaniego Olivares		Tucson	85745		Mexico	1996
Sylvia Samalie Abanonu		Tucson	85718		Uganda	1994, 1996, 1997
Elva Parra Adame		Tucson	85745		Mexico	1996
Antonio A. Sanchez, Jr.		Tucson	85705		Mexico	1992
Foreign Birth Place and Did not Vote						
Anabel Munoz Haros		Tucson	85706		Mexico	
Martha Fimbres		Tucson	85705		Mexico	
Ana Inigo		Tucson	85706		Mexico	
Rosario Navarro Molina		Tucson	85714		Mexico	
Lydia R. Soto		Rillito	85654		Mexico	
Julia Isabel Martinez		Tucson	85706		Mexico	
Alfonso Rodriguez Serrano		Tucson	85713		Mexico	
Tara Leeanne Drew		Tucson	85712		England	
Elisa Del Carmen Gomez		Tucson	85730		Panama	
Yefid Tirádo		Tucson	85706		not listed	
Genoveva Alicia Mazon		Tucson	85714		Mexico	
Maria Rosario Madrid		Sahuarita	85629		Mexico	
Roman S. Saponka		Tucson	85716		Lithuania	
Rosario Sylva Moreno		Tucson	85714		Mexico	
Norma Irene Stackpole		Tucson	85713		Mexico	

[SEAL]
Pima County Recorder
F. Ann Rodriguez

Bob Jones
Chief Deputy Recorder
Document Recording:
(520) 623-3177

Christopher J. Roads
Registrar of Voters
Voter Registration:
(520) 623-2649

October 4, 1999

Honorable Barbara LaWall
Pima County Attorney
32 North Stone Avenue, Suite 1400
Tucson, Arizona 85701

Re: Illegal Voter Registration
Elva Adame Parra

Dear Barbara:

On August 26, 1999, I wrote to you concerning a number of individuals who had registered to vote but later indicated that they were not citizens of the United States. One of the individuals included in that report was Elva Adame Parra, [Date Of Birth Omitted]. It is my understanding that this matter is still under investigation. We had previously cancelled that voter registration.

On September 28, 1999, my office received another voter registration card from Elva Adame Parra. She has once again attempted to register to vote.

Enclosed is a copy of the voter registration affidavit she submitted to our office.

Should you have any questions concerning this, please feel free to contact me.

Sincerely,

PIMA COUNTY
RECORDER'S OFFICE

/s/ Christopher J. Roads
Christopher J. Roads
Registrar of Voters

CJR:sss 99LTR117

Attachment

xc: F. Ann Rodriguez

[SEAL]

Pima County Recorder
F. ANN RODRIGUEZ
RECORDER

MAIN OFFICE:
115 N. CHURCH AVE.
TUCSON, ARIZONA
85701-1199

Recording: (520) 623-3177
Voter Registration: (520) 623-2649
FAX: (520) 623-1785

EASTSIDE ANNEX:
6920 E. BROADWAY BLVD.
SUITE D
TUCSON, ARIZONA 85710

Recording: (520) 623-3177
FAX: (520) 296-4239

July 1, 1999

Honorable Barbara LaWall
Pima County Attorney
32 North Stone Avenue, Suite 1400
Tucson, Arizona 85701

Re: Illegal Voter Registration and Illegal Voting
Jose Luis Ojeda
DOB: [Omitted]
Registration number: 1093366

Dear Barbara:

I have been provided information that the above named individual registered to vote and actually voted in three elections despite not being a citizen of the United States. I am referring this matter to you for review to determine if prosecution is appropriate under A.R.S. §16-182, a class six felony, and/or A.R.S. §16-1016(A)(1), a class five felony.

On June 29, 1999, Mr. Ojeda came to the Recorder's Office and requested that his voter registration be cancelled since he is not a citizen of the United States. His voter registration card was pulled and it was discovered that Mr. Ojeda had registered to vote on December 22, 1995. An individual who works as a paid circulator had assisted him in registering at that time.

A records check through our election files was conducted and it was determined that Mr. Ojeda had actually voted in three elections, the 1996 General Election, the 1997 City of Tucson General Election and the 1997 County General Election. The 1997 elections were held on the same date, but the City handled its own election separately from the County. Mr. Ojeda would have voted two separate ballots on that date.

Although Mr. Ojeda was initially evasive about being registered, he did admit to the staff at this office that he had voted in the elections. Mr. Ojeda advised the staff that he had recently applied for citizenship and was concerned that they would discover his voter registration and that this might hinder his citizenship process. After he provided us with identification and a written request to cancel his registration, it was cancelled.

The two members of the Recorder's staff who dealt directly with Mr. Ojeda are Lily Shafer and Ida Moody.

I am enclosing copies of Mr. Ojeda's voter registration card, his Arizona driver's license, the voter

history file, the request for cancellation and Lily Shafer's memo to me concerning this incident. I will maintain the originals of these documents.

I would note that this is the second individual to come forward to this office within the past week to request that their voter registration be cancelled because they were not citizens. Both advised our office that they had citizenship applications pending. On the national level, voter registration offices have seen an increase in non-citizens registering to vote and actually voting in elections. In fact, in one California congressional race, results were voided because of the large amount of illegal registration and voting by non-citizens in that district. Voter registration offices around the country are therefore carefully reviewing this problem.

Should you need any additional information concerning this matter, please feel free to contact me.

Sincerely,

PIMA COUNTY
RECORDER'S OFFICE

/s/ Christopher J. Roads
Christopher J. Roads
Registrar of Voters

CJR:sss 99LTR079

Enclosures

xc: F. Ann Rodriguez
Pima County Recorder

NON-CITIZEN CANCELLATIONS
2/22/2007

NAME	8MILLION NO.	"Y"	YEAR(S)
ISABELITA S EIDSON	8454895		
TOVE SONDERGAARD	8454896		
CARMEN J GONZALEZ	8454897	✓	G2004
MRODRAG CAREVIC	8454898		
TEHETINA TAMRAT-HILDEBRAND	8454899		
ROSA LEE CLEMONS	8454900	✓	G2004
FRANCISCO M MORENTE	8454901		
CARLOS ALDACO	8454902		
JENNIFER DAVIDSON	8454903		
CARLOS I CALVO	8454904		
LENA LEONA CHRISTIE	8454905		
ANTONIO MORADO	8454906		
DAVID R VELASQUEZ	8454907		
KAN MING GAVIN LAU	8454908		
MODESTA G PADILLA JOHNSON	8454909		
FERNANDO A GRIJALVA VIRAMONTES	8454910	✓	G2006
SOPHIA HERRERA DEGOLLADO	8454911		
GUADALUPE CALDERON-SOBERANES	8454912		

SO LE	8454913		
GRISELDA SEHNERT	8454914		
APRIL GAIL MURRAY	8454915		
MERCEDES MORENO ELSEA	8454916		
IRMA HERNANDEZ	8454917		
CORNELIO P ROA JR	8454918		
LINDA PECK ARNOLD	8454919	✓	G2002, P/G2004, P/G2006
MARY G GUAIARDO	8454920		
BARBARA ANN LANG	8454921	✓	G2006
RIGOBERTO REYES SANTIAGO	8454922		
JOSE ANTONIO ESQUEDA	8454923	✓	G2004
JUDITH A ROBINSON	8454924	✓	P2002
ARNULFO CASTELO	8454925		
DAVID LESLIE BRADLEY	8454926	✓	G2002, G2004
MARIA CARDOZA	8454928		
CHRISTIAN LUCERO	8454929		
JOSE L HERNANDEZ REYNO	8454930	✓	G2002, P/G2004, G2006
RAYMUNDO RUIZ JR	8454931	✓	G2004, P/G2006
MARIA DEL CARMEN DALPRA	8454932	✓	G2002, G2004, G2006
ABU SILLAH	8454933		
BLANCA M CORREA	8454935		
DUNG ANH VO	8454936		

LUIS ENRIQUE AGUERO	8454938		
CHI-PING YAO	8454939	✓	G2004
ANTON BRUNBAUER	8454940	✓	G2004
ROBERTO VELEZ	8454941	✓	P/G2002, P/G2004, P/G2006
DAVID L KRIMMER JR	8454942	✓	P/G2002, P/G2004
MICHELE RENEE MORICE	8454943		
ADOLFO PALOS AGUILAR	8454944		
SUZANNE BLANCHE RAYNES	8454945		
ULISES Z FLORES	8454947		
ANGEL RICARDO MONROY	8454948	✓	G2004
GEORGE A MACDONALD	8454949		
OMAR FAROOD CHAUDHRY	8454950	✓	G2004, G2006
PIA G HICKS	8454951		
SADETA AVDIC SABANOVIC	8454952		
PEDRO GARCIA	8454953	✓	G2004, G2006
JAMES CAMPBELL	8454954		

NON-CITIZEN CANCELLATIONS
3/30/2007

NAME	8MILLION NO.	"Y"	YEAR(S)
JOSE MERCED MARTINEZ	8458777	✓	G2002
BARBARA LEE DOWNEN	8458778	✓	G2002, G2004
ESTHER GONZALES-PAREDONES	8458779	✓	G2006
BILL MORING	8458780	✓	G/P2002, G/P2004, G/P2006
HUGO OROZCO	8458781	✓	G2004
ANDREW G WHITE	8458782	✓	G2002, G2004, G2006
MARIA L VALDEZ	8458783		
DZEMILA CAJIC	8458784		
KIL-KIM	8458785		
PEDRO ALVAREZ	8458786		
ZINA F VALLONE	8458787		
KARLOS CORTEZ	8458788		
MARCELLA MAJALCA	8458789		
ISATTA A MAGONA	8458790		
MARIA A OLIVARES	8458791		
RICARDO C HADDAD	8458792		
VICTOR PEREZ	8458793		
MISAEL CRUZ RAMIREZ	8458794		
PHONEXAY KHATINHA	8458795		
GUM DENG RING	8458796		

MARIA EUSTACIA RUIZ	8458797		
MARIA DEL CARMEN MORENO	8458798	✓	G2006
ROBERTO TOSCANO OLIVEROS	8458799		
LUIS MARIO MARTINEZ	8458800		
NGO DINH NGUYEN	8458801		
KAREN JANE KLOIAN	8458802		
LUIS ALONSO AVILA	8458803		
NEAL EMMET MEHLHORN	8458804		
MARIA EUGENIA WICKER	8458805		
SOVANNARA CHEY	8458806		
JOVANA DRAGOSAVLJEVIC	8458807		
ADOLFO T VALENZUELA	8458808		
JUAN CASTILLO PEREZ	8458809		
MAHEALON GERMAINE ALEXANDER	8458810	✓	G2004
WILLIAM M MASSANET	8458811	✓	G/P2002
JOHN E WAHLBERG	8458812		
PECO SLOBODANKA	8458813		
ELIKONI PUMAIONGO FAHINA	8458814		
JOHNATHAN PAUL MERWIN	8458815		
SANDRA GARCIA	8458816		

JOSE GARCIA	8458817		
MARTIN M BELTRAN	8458819		
GUSTAVO DUARTE CHAVARRIA	8458820	✓	G2004
MARIA R FORD	8458821	✓	G2002, G2004, G2006
JESUS LOERA	8458822		

NON-CITIZEN CANCELLATIONS
8-31-07

NAME	8MILLION NO.	"Y"	YEAR(S)
NELCITA F. KOSIENSKI	8469276	✓	G2004 *Cancelled for Request*
SOCORRO SANCHEZ	8469277	✓	G2002, G2004
EDEN MAGDARAOG BORBOR	8469278		
DORA F PEREZ	8469279		
LACOSTA R LOURANCE	8469280		
LOUIS A GALVAO	8469281	✓	G2004
LUCILA VARELA	8469282	✓	G2002, G2004, G2006
RIGOBERTO VALDEZ	8469283		
PEDRO HERIBERTO CABALLERO	8469284	✓	G2002, G2004

JOSE MENDOZA SANCHEZ	8469285		
YI-CHUN HANK CHAO	8469286		
ANDRE GYSBERTS	8469287	✓	G2002
JOSE ADRIAN GARIBAY	8469708		
LUZ DELIA RAMOS	8469709		
NOHELIA FARIAS	8469710		
CLAUDIA ADRIANA MARTINEZ	8469711	✓	G2004
RITA C AL-ABDULLAH	8469814	✓	G2002, G2004
JOAQUIN MULGADO	8469833		
GUADALUPE ENRIQUEZ	8469834		
STEPHANIE MAI NGUYEN	8469872		*Cancelled Per Request*
LESLIE NOHEMI GARCIA	8469873		
MELISSA MARIE ANZAR	8469889		*Cancelled Per Request*
PATRICIA REYNA	8469971		
MARCELO MARCINKEVICIUS	8469972	✓	G2004
ALICIA A YOUNG	8469973	✓	G2004, G2006

NON-CITIZEN CANCELLATIONS
12-

NAME	8MILLION NO.	"Y"	YEAR(S)
ANGEL S VELASQUEZ-OROZCO	8470731		
JOHNNY E VENTURA	8470732		
MARIA GUERRERO	8470734		
KHANI THACH	8470735		
DIANE DOREANA OCONNOR	8470736		
DOUGLAS PETER MAGALLANES	8470737		
JAN PETER ELMBLAD	8470863		
JON JAMES DARROCH	8470864		
JOSE G CUADRA	8471525		
AN THUY TRAN	8471526		
BELINDA ANTWI OMARI	8471528		
CARMELLA ROSITA ANDREWS	8471529		
GUADALUPE TRINIDAD SANDOVAL	8471530		
RAFAEL SALAZAR	8471531		
JUAN JESUS ROMAN-CARRO	8471532		
ALEJANDRO QUINTANA GARCIA	8471533	✓	P/G2002, P/G2004, P/G2006
RUTH ELIZABETH REGALADO	8471534		
LIZBETH T ACEVEDO	8471535		
WILLIAM ALEXANDER LESTER	8471536		

AURELIAN EUGENE BALTA	8471537		
HALA M WAHBEH	8471538		
ANA BERENICE CASTANEDA ALANIZ	8471539	✓	G2002, P/G2004
GUSTAVO J ARTEAGA II	8471540		
CARLOS F HERNANDEZ	8471796		
CLAUDIA F MENDOZA	8471797		
BOBBY LEE CURRIDEN	8471798		
MASON C GOE	8471799		
MARIA ISABEL RASCON	8471800		
JESUS GONZALEZ SR	8471991		
OMAR ROJAS	8471992		
ARTURO CARRILLO ESCALANTE	8471993		
CINDY LOU KNUTSON	8471994		

NON-CITIZEN CANCELLATIONS
12-07-2007

NAME	8MILLION NO.	"Y"	YEAR(S)
JAVIER HERNANDEZ-HUITRON	8478928		
BENDERA PENDELERO	8478929		
VICTOR CABRERA JR	8478930		
ARMANDO RUAN PARTIDA	8478931		

MUHAMMAD ASAD BHUTTA	8478932		
VERA H KIRBY	8478933	✓	G2004, G2006
JOSE L PLASCENCIA	8478934		
DAVID SEGURA	8478935		
JAZMIN CONSUELO LOPEZ	8486461		
JUAN R CHAVEZ	8486462		

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[98] In re: Gonzalez v. Arizona – Krysty Marin – January 18, 2008

* * *

Q Well, ever. In your recollection do you ever recall a situation in which a non citizen registered to vote?

A We had one here. I don't remember what her name is right now off the top of my head. And when I spoke with her she said that she didn't realize what she was signing. That it was somebody that was going door to door registering people to vote. So we had her just remove her name from the rolls.

Q Was this a situation where you contacted her or she contacted you?

A We contacted her.

Q And how did you come to contact her?

A Her name showed up on the F/N when there was a change, it showed up on a change.

Q And how did you contact her?

A I contacted the County Attorney's office.

Q Don't tell me what you said to him, or what he said to you. Skip forward to the part where you then contacted her, and tell me how you did that, if it was your office.

A We contacted her with a letter, and it was a certified letter, and it came back undeliverable. I'm trying to remember. It's been quite a while. And then I believe we sent the Sheriff out. He investigated, I think, and found her.

Q And then there was a point in time where she got in touch with your office?

A She came in.

* * *

[11] 7/31/2006 Osborne, Karen

* * *

citizen had voted by early ballot in Maricopa County?

A. Yes.

Q. And have you also produced all documents relating to any allegation since January 1, 1996 that an individual impersonated a registered voter at a polling place in Maricopa County?

A. Yes.

Q. Do you have any documents that related to impersonation of a voter?

A. No, we don't.

Q. I'm now going to give you what the court reporter has marked as Exhibit 3. This is an affidavit. Do you recognize that document?

A. I do.

Q. Is this an affidavit that you gave?

A. Yes.

Q. And you signed it –

A. Yes.

Q. – on May 31, 2006?

A. Yes.

Q. If you would turn to paragraph 11, is it true that you stated in this affidavit under oath that the County Recorder's Office referred 159 matters to the County Attorney where there was evidence that non-citizens had registered to vote?

* * *

[19] voting since 1996?

A. Yes.

Q. Okay. How many?

A. There was one woman. I do not remember her name. This was many years ago and may have predated '96, but I don't believe that it did.

She had been in the United States for the majority of her life, came here with – as a young married person with her husband, who both had resident alien cards, had determined that she was not going to apply for citizenship until the people of her family in Mexico had passed away. She did not want to give up her citizenship there.

She finally did apply for citizenship. Her parents had passed away. She then in the middle of applying for citizenship, someone had convinced her that she could register and, unfortunately, she believed them and she voted in a school election.

We had had an individual who used to come to the counter and look up voter registrations and found her name and her country of birth to be Mexico. I don't know how he knew her. And he filed a complaint. And that's the only one that I can think of that we did have that it was followed through for prosecution. I do not know what happened to her.

* * *

[28] that everybody understood what was – what was at stake. And it renewed our effort to try and make sure that these people understood that this was not – they can make a lot of money, but how dare them on the backs of these folks.

Q I understand. Is there a community group that you know that doesn't pay their people to go out and do voter registration?

A It would be in the smallest of contexts. The large ones – when we were working with ACORN in '04, was not a pretty time. There's no other way to put that.

A It was enormous amounts of voter registrations that were – and there is no other term for it other than garbage, these were scrawled, they were – they were not whole addresses, these were not real people, Nacho Cheese, that type thing. These folks that – and they were getting paid for it.

So we had them in on many occasions. On one particular occasion, we had gotten a group in and there happened to be a – happened to be at the front counter, picked it up and there were 24 that said, "I am not a citizen." We drug them back in [29] and asked them to bring their lawyers to say, "Do you understand if I put these on the file, these people have committed a felony." I believed then and I believe now that it is not the person who is doing this, but the person who is getting them to do this in order to make their money.

Q So it's your belief, then, that noncitizens who end up putting in a voter registration application are largely being misled or fooled into putting in their application?

A I cannot believe that anybody would want to jeopardize their situation after having lived here for many years, make their reports every year to the INS, pay their taxes, and do everything, I cannot believe that they would want to jeopardize, especially at the cost of a felony, and then the thought of not being able to stay and not get the citizenship, it is just incomprehensible to me that that is not some sort of trickery on behalf of the person who's

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, **c/o Strickland Brockington Lewis LLP** **1170 Peachtree Street NE** **Suite 2200** **Atlanta, GA 30309-7200** **Plaintiff,** **v.** **ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,** **950 Pennsylvania Avenue, NW Washington DC 20350** **Defendant.**	**CIVIL ACTION** **FILE NO. _____** **THREE JUDGE PANEL**

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW THE STATE OF GEORGIA and, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (hereinafter, "Section 5"), seeks a declaratory judgment that Act 143 of the 2009 Georgia General Assembly ("Act 143"), along with (1) the regulations promulgated pursuant to the terms of Act 143 by the Secretary of State (Ga. Comp. R. & Regs. r. 590-8-1-.02), (2) regulations promulgated pursuant to the terms of Act 143 by the State Election Board (Ga. Comp. R. & Regs. r. 183-1-6-.06), (3) a voter

registration form revised to comport with Act 143, (4) the notice to applicants who have not provided satisfactory evidence of citizenship with their voter registration application, (5) the notice to applicants who request a hearing, and (6) the notice provided to voters who cast a provisional ballot, neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race or color under Section 5. Alternatively, the State of Georgia seeks a declaration that Section 5, as most recently amended and renewed in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and its enforcement should be permanently enjoined.

1.

This action is brought by Plaintiff the State of Georgia ("Georgia" or "the State") pursuant to Section 5 and 28 U.S.C. § 2201.

2.

Georgia is a State within the United States of America authorized to bring this action on behalf of itself and its citizens.

3.

Defendant Eric H. Holder, Jr., Attorney General of the United States, is charged with certain responsibilities pursuant to Section 5, including the defense of a Section 5 declaratory judgment action brought in the United States District Court for the District of Columbia.

4.

Section 5 prohibits a State or political subdivision subject to Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (hereinafter, "Section 4"), from enforcing "any voting qualification or prerequisite to voting; or standard, practice, or procedure with respect to voting different from that in force and effect on November 1, 1964" unless it has obtained a declaratory judgment from the United States District Court for the District of Columbia that such change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the Attorney General of the United States and the Attorney General has not objected to it.

5.

Under 42 U.S.C. § 1973b(b), the State of Georgia is a covered jurisdiction subject to the preclearance requirement of Section 5 because in 1965 (1) the Attorney General determined that Georgia "maintained on November 1, 1964, any test or device," and

(2) the Director of the Census determined "that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964."

6.

Forty-five years later, based on the very same formula originally implemented in 1965 and still found in Section 4, Georgia remains a covered jurisdiction subject to the preclearance requirements of Section 5, originally intended as a temporary, emergency provision.

7.

Georgia brings this action pursuant to Section 5 and 28 U.S.C. § 2201, seeking declaratory judgment that the Citizenship Verification Process as defined below neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, thereby allowing the State to enforce federal and state laws relating to voter registration and verification.

8.

The Court has subject matter jurisdiction of this action under Section 5 and 28 U.S.C. § 1331 because an actual controversy exists between the parties

regarding the State's ability to enforce certain procedures at issue in this litigation.

9.

Venue and jurisdiction are proper in this Court pursuant to Section 5 and 28 U.S.C. § 2284.

10.

This action is properly determinable by a district court of three judges in accordance with Section 5 and 28 U.S.C. § 2284.

FACTS

Current Requirements Regarding Citizenship and Verification of Same

11.

Both the Georgia Constitution and Georgia statutory law require that a person be a citizen of the United States in order to be eligible to register and vote. GA. CONST. Art. II, § 1, ¶ 2; O.C.G.A. § 21-2-216(a)(2).

12.

Federal law also requires that a person be a citizen of the United States in order to register and vote. 42 U.S.C. § 15483(b)(4)(A)(i).

13.

Although both Georgia and federal law require that voters be citizens of the United States, Georgia's current benchmark for determining whether an applicant for voter registration is a U.S. citizen consists only of database matching through a verification process required by the Help America Vote Act of 2002 ("HAVA")[1] and the voter's self-declaration on the voter registration application.

14.

In spite of the legal requirements in Georgia and federal law, non-citizens have registered to vote in Georgia and have voted in Georgia elections.

15.

On January 24, 2005, the Department of Justice precleared Arizona's citizenship verification process (Ariz. Rev. Stat. 16-166(F)(1-6) (2008)), a very similar statute for verifying citizenship of voter registration applicants.

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[1] The Department of Justice precleared this verification process ("HAVA Verification Process") on August 18, 2010. DOJ Submission No. 2010-3259.

Passage of Act 143 and Attendant Rules

16.

In 2009, the Georgia General Assembly passed Senate Bill 86, legislation to ensure that each newly-registered Georgia voter was, in fact, a citizen of the United States at the time he or she applied to register to vote.

17.

Senate Bill 86 was introduced in the Georgia State Senate on February 3, 2009 and assigned to the Senate Ethics Committee, which considers election-related legislation.

18.

The Senate Ethics Committee reviewed Senate Bill 86, conducted a public hearing on the bill and subsequently amended and passed Senate Bill 86 on February 17, 2009.

19.

On March 3, 2009, Senate Bill 86 passed on the floor of the Georgia Senate.

20.

On March 25, 2009, the House Government Affairs Committee considered and passed Senate Bill 86 during a public meeting.

21.

On April 3, 2009, the House of Representatives considered Senate Bill 86, amended the bill and passed it with amendments.

22.

The Senate agreed to the House amendments later on April 3, 2009, and the bill was sent to the Governor for his signature.

23.

In passing Senate Bill 86, the Georgia General Assembly acted pursuant to its lawmaking authority under Article III, Section V of the Georgia Constitution.

24.

Pursuant to his authority under Article V, Section II of the Georgia Constitution, the Governor signed Senate Bill 86 on May 5, 2009, designating it as Act 143 for 2009. The text of Act 143 is attached hereto Exhibit 1 and incorporated by reference.

25.

Following enactment of Act 143, the Georgia State Election Board ("SEB") promulgated a rule implementing Act 143, as referenced in O.C.G.A. § 21-2-216(g)(2)(G) (the "SEB rule"). The SEB rule is

located at Ga. Comp. R. & Regs. r. 183-1-6-.06, attached hereto as Exhibit 2 and incorporated by reference.

26.

The SEB promulgated the SEB rule pursuant to its authority under O.C.G.A. §§ 21-2-31 and 21-2-50 and in accordance with the procedures outlined in the Georgia Administrative Procedure Act, O.C.G.A. §§ 50-13-4 and 50-13-5.

27.

Following the enactment of Act 143, the Secretary of State promulgated a rule implementing Act 143, as referenced in O.C.G.A. § 21-2-216(g)(7) (the "Secretary of State rule"). The Secretary of State rule is located at Ga. Comp. R. & Regs. r. 590-8-1-.02, attached hereto as Exhibit 3 and incorporated by reference.

28.

The Secretary of State promulgated the Secretary of State rule pursuant to her authority under O.C.G.A. § 21-2-216 and in accordance with the procedures outlined in the Georgia Administrative Procedure Act, O.C.G.A. §§ 50-13-4 and 50-13-5.

29.

Following the passage of Act 143 and the implementing rules, in accordance with the authority provided under O.C.G.A. § 21-2-219, the Secretary of State's office revised the Georgia Voter Registration Application to reflect the requirements of Act 143. The updated voter registration form is attached hereto as Exhibit 4 and incorporated by reference.

30.

The Secretary of State's office created the notice to applicants provided for in the SEB rule in the form of the letter attached as Exhibit 5 and incorporated by reference.

31.

The Secretary of State's office created the notice to applicants who request a hearing provided for in the SEB rule in the form of the letter attached as Exhibit 6 and incorporated by reference.

32.

The Secretary of State's office created the notice to be provided to voters who cast a provisional ballot provided for in the SEB rule attached as Exhibit 7 and incorporated by reference.

The Citizenship Verification Process Sought to be Precleared

33.

Pursuant to (1) the provisions of Act 143, (2) the SEB rule, (3) the Secretary of State rule, (4) the revised Georgia Voter Registration Application, (5) the letter attached as Exhibit 5, (6) the notice to applicants who request a hearing attached as Exhibit 6, and (7) the notice provided to voters who cast a provisional ballot attached as Exhibit 7 (collectively referred to as the "Citizenship Verification Process"), the State of Georgia will be able to confirm that all new Georgia voter registrants are citizens of the United States.

34.

The Citizenship Verification Process applies to all individuals, regardless of race, who register to vote after the Citizenship Verification Process receives preclearance or a ruling by this Court under Count II that preclearance is not required.

35.

Under the provisions of HAVA, each applicant must affirmatively state on the voter registration application that he or she is a U.S. citizen.

36.

Georgia's Citizenship Verification Process incorporates the HAVA requirement of an affirmative statement of citizenship on the voter registration application.

37.

If an applicant states on the voter registration application that he or she is not a U.S. citizen, then, in accordance with both HAVA and the Citizenship Verification Process, that application is rejected.

38.

In addition to an affirmative statement of United States citizenship, the Citizenship Verification Process requires that each new registrant provide satisfactory evidence of citizenship before he or she is added to the official list of electors.

39.

Under the Citizenship Verification Process, the primary way for an applicant to provide satisfactory evidence of citizenship is to provide his or her Georgia driver's license number or identification card number issued by the Georgia Department of Driver Services ("DDS").

40.

Under the Citizenship Verification Process, if an applicant provides a Georgia driver's license number or identification card number issued by DDS with his or her voter registration application, the Secretary of State will forward the applicant's information to DDS for confirmation that the applicant has provided satisfactory evidence of citizenship to DDS.

41.

If DDS records reflect that the applicant has previously provided satisfactory evidence of citizenship to DDS, that information will be provided to the Secretary of State, and no additional evidence of citizenship will be required from the applicant; the applicant will be confirmed to be a U.S. citizen in the voter registration database and added to the official list of electors.

42.

If DDS records do not indicate that an individual is a citizen of the United States, that information will be provided to the Secretary of State, and the Secretary of State will then attempt to verify the individual's citizenship status through the SAVE program.[2]

---

[2] The Secretary of State will negotiate a Memorandum of Understanding with the Department of Homeland Security regarding the use of SAVE.

43.

If the SAVE program confirms that an applicant is a citizen, the applicant will be confirmed to be a U.S. citizen in the voter registration database and added to the official list of electors.

44.

Notwithstanding any other requirement under state or federal law, when registering to vote, applicants are not required to have or to use a Georgia driver's license or DDS-issued identification card to demonstrate satisfactory evidence of citizenship but may also demonstrate satisfactory evidence of citizenship as follows:

(a) by showing a driver's license or identification card from another state, if that license or card states that the applicant is a U.S. Citizen. Any State whose driver's license and identification cards comply with the requirements of the federal REAL ID Act of 2005 contain such a statement; or

(b) by submitting any of the following documents: a birth certificate, a U.S. passport, naturalization documents, a verified alien registration number, any document proving citizenship under the Immigration Reform and Control Act of 1986, a Bureau of Indian Affairs card number, a tribal treaty card number, a tribal enrollment number, or other forms as provided in the SEB rule, Exhibit 2.

45.

If an applicant is unable to provide the satisfactory evidence of citizenship required by the statute or regulations at the time of applying for registration, (a) the applicant may request a hearing with the appropriate county board of registrars for consideration of additional types of documentation and such hearing will be held or (b) if an applicant chooses not to request a hearing at the time he or she is applying for registration, the applicant will receive a letter from the board of registrars (Exhibit 5 attached) outlining the next steps, including a hearing to consider other types of documentation.

46.

Pursuant to the procedure outlined in the SEB rule, if an applicant does not provide satisfactory evidence of citizenship with his or her original voter application and does not request a hearing when applying, the county board of registrars sends notice within 10 days of receipt of the application by nonforwardable, first-class mail to the mailing address listed on the application to inform the applicant of the missing information and that the application will be rejected if satisfactory evidence of citizenship is not provided to the board of registrars within 30 days from the date of the notice. A copy of the notice is attached hereto as Exhibit 5.

47.

A voter registration applicant may provide satisfactory evidence of citizenship to the appropriate county board of registrars by United States mail, facsimile, electronic mail or personal delivery.

48.

If the applicant requests a hearing at the time of his or her application for registration, the board conducts a hearing on the applicant's citizenship after providing the notice attached as Exhibit 6.

49.

The applicant is not required to attend the board of registrars' hearing and may submit any evidence he or she wishes for the board to consider.

50.

The board of registrars is empowered to consider additional forms of documentation beyond the statutory and regulatory list at the hearing. *See* Exhibit 2.

51.

If the individual provides the information outlined in the SEB rule or the board of registrars determines that the applicant is a U.S. citizen based on the documentation provided at the hearing, the

applicant's voter registration application is accepted and the voter added to the official list of electors.

52.

If the individual registers within 30 days of a primary or general election and does not provide satisfactory evidence of citizenship with the application, the individual may either (a) present satisfactory evidence of citizenship at the time he or she requests a ballot or (b) vote a provisional ballot and provide satisfactory evidence of citizenship within the time allotted. Any individual electing to cast a provisional ballot will be given the notice attached as Exhibit 7.

53.

If satisfactory evidence of United States citizenship is not provided, the applicant's voter registration application is rejected and the voter is not added to the official list of electors.

54.

An applicant may appeal the decision of the board of registrars related to citizenship status to the superior court, in accordance with the already-precleared statutory process set forth in O.C.G.A. § 21-2-228(f).

55.

If the applicant's voter registration application is rejected for failure to provide satisfactory evidence of United States citizenship, the applicant may reapply at any time.

56.

Under Section 5, the provisions of the Citizenship Verification Process cannot be implemented by the State of Georgia unless and until this Court enters a declaratory judgment, as requested by this Complaint, or unless this Court determines that Section 5 is unconstitutional.

57.

The provisions of the Citizenship Verification Process have not yet been implemented by the State of Georgia.

58.

The HAVA Verification Process is the benchmark for purposes of Section 5.

COUNT I – DECLARATORY JUDGMENT

59.

The allegations of Paragraphs 1 through 58 are incorporated as if fully set forth herein.

60.

The State of Georgia did not adopt and will not use the Citizenship Verification Process for any discriminatory purpose but simply to ensure that the United States citizenship requirements of both Georgia law and federal law are enforced.

61.

Based on Georgia's history of non-citizens registering to vote *and* voting in elections, the Citizenship Verification Process is a reasonable remedy with the least possible burden on new applicants.

62.

The Citizenship Verification Process, when compared to Georgia's existing or "benchmark" verification process, does not lead to a "retrogression" in the position of racial minorities in that it does not have the effect of denying or abridging the right to vote on account of race or color.

63.

The Citizenship Verification Process accordingly neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.

64.

The Citizenship Verification Process does not and will not prohibit any citizen of the United States from electing his or her preferred candidate of choice.

65.

The Citizenship Verification Process applies uniformly to all new registrants regardless of race or color.

66.

The Citizenship Verification Process does not result in any discriminatory effect that is statistically significant *(i.e.,* more than *de minimis).*

67.

The State of Georgia is entitled to a judgment that the Citizenship Verification Process neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color under Section 5 of the Voting Rights Act of 1965, as amended, and that such legislation, regulations, policies, and forms may be implemented without further delay.

COUNT II – DECLARATORY JUDGMENT

68.

The allegations of Paragraphs 1 through 67 are incorporated as if fully set forth herein.

69.

If this Court declines to enter a declaratory judgment that the Citizenship Verification Process neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color under Section 5, then, alternatively, the State of Georgia seeks declaratory judgment that the continued application of Section 5 to the State is an unconstitutional imposition on the sovereignty of the State of Georgia, is beyond Congress's authority, and therefore is a violation of the Tenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

70.

When first adopted in 1965, Section 5 was a temporary measure necessary to address pervasive racial discrimination in the election process which existed in some areas of the country, including Georgia.

71.

When Congress originally enacted the preclearance requirements of Section 5, and even as late as

the reauthorization of those provisions in 1982, the conditions justifying the imposition of the preclearance requirements upon Georgia either existed or existed in very recent memory.

72.

However, when reauthorizing Section 5 in 2006, Congress continued to base preclearance coverage on a formula based on the 1964, 1968, and 1972 Presidential elections, leaving the State of Georgia in the status of a covered jurisdiction, while not covering other States or portions of States that would have been covered under any modern measure that Congress might reasonably have imposed.

73.

The State of Georgia and its voters are being punished for discriminatory conditions that existed more than forty-five years ago but have long since been remedied, while jurisdictions where similar discriminatory conditions currently *do* exist are not subject to any federal interference under Section 5 simply because the current discriminatory conditions did not exist or were overlooked when Section 5 coverage was determined more than forty-five years ago.

74.

Individuals who were not even alive when the Voting Rights Act was passed are voting and are penalized for those conditions forty-five years ago.

75.

Congress' 2007 reauthorization of Section 5 was a disproportionate, irrational, and incongruous remedy for a perceived harm, measured by a more than forty-five year old formula, which, if updated to today, would not cover the State of Georgia.

76.

Unlike other provisions of the Voting Rights Act, Section 5 is no longer a "congruent and proportional" remedial exercise of Congress's enforcement power.

77.

Unlike Section 5, Section 2 of the Voting Rights Act is not temporary, applies to all States uniformly, and can be used to address the same discriminatory voting practices Section 5 was designed to prevent.

78.

Therefore, as applied to the State of Georgia, the preclearance requirements of Section 5 violate the Tenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

79.

Georgia voters and the State itself are harmed by the overreach of Section 5 because the State cannot make *any* adjustments to *any* elections practice or procedure without the prior approval of the federal government, despite the fact that there is no current cause for such oversight.

80.

Continued imposition of the preclearance requirement on Georgia hinders the right of Georgia voters to decide the manner in which their representation at the local level will be determined – that is, to alter the manner and procedures by which their representatives in the State are elected – because the preclearance procedures are costly and burdensome.

81.

Furthermore, minority voters in the State of Georgia are harmed, not aided, by Section 5 coverage, because they are effectively denied the ability to control, through their elected representatives, the method by which that representation is to be maintained and the procedures by which elections will take place.

82.

Bailout under 42 U.S.C. § 1973c is not an option for the State of Georgia because, within the last ten

years, the DOJ lodged objections against the State's original submission and request for reconsideration of the Georgia HAVA Verification Process (which was later precleared) and against voting changes of four subjurisdictions within the State of Georgia.

83.

The State of Georgia has almost 900 subjurisdictions.

84.

The State of Georgia has no operational control over any of its subjurisidictions, either generally or specifically with respect to the election practices and procedures in those subjurisdictions.

85.

As applied to the State of Georgia, Section 5 lacks any continuing justification and is nothing more than a scarlet letter that Congress, without any cognizable justification, has chosen to continue to place on the State to punish it for conditions that existed more than forty-five years ago but do not exist today.

86.

Congress cannot forever rely on findings of conditions that existed forty-five years ago to continue to justify the use of its Fifteenth Amendment

enforcement power in a way that infringes on the rights of an entire generation of voters who were not even alive when those discriminatory practices were ended.

WHEREFORE, the State of Georgia respectfully prays that this Court:

(A) Convene a three-judge District Court to hear the matters raised by the State of Georgia's Complaint;

(B) Enter such other and further orders as may be necessary during the pendency of this case to ensure that it be handled as expeditiously as possible;

(C) Enter a declaratory judgment that the Citizenship Verification Process (including Act 143, the Secretary of State rule, the SEB rule, the updated voter registration form, and the various notices to applicants attached hereto) neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, and that each of the statutes, regulations, policies, and forms at issue may be enforced by Plaintiff without any impediment on account of Section 5 of the Voting Rights Act of 1965, as amended;

(E) In the event the Court finds the Citizenship Verification Process (including Act 143, the Secretary of State rule, the SEB rule, the updated voter registration form, and the various notices to applicants attached hereto) does not meet the requirements for preclearance under Section 5, enter a declaratory judgment that Section 5 is an unconstitutional

extension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment and enjoin further enforcement of Section 5; and

(F) Grant the State of Georgia such other, further, and different relief as this Court may deem just and proper.

This 12th day of November, 2010.

Respectfully submitted,

/s/ Anne W. Lewis

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U.S. Department of Justice

[SEAL] Civil Rights Division

TCH:RSB:BFH:JP:maf
DJ 166-012-3
2011-0868

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

March 30, 2011

Anne W. Lewis, Esq.
Strickland Brockington Lewis
1170 Peachtree Street, NE, Suite 2200
Atlanta, Georgia 30309-7200

Dear Ms. Lewis:

This refers to the following changes for the State of Georgia:

1. Act No. 143 (S.B. 86) (2009), which provides that future voter registration applications shall be accompanied by satisfactory evidence of United States citizenship and for revised voter registration citizenship verification procedures;

2. Secretary of State Rule 590-8-1-.02, which provides for procedures for the verification of voter registration information, including use of the SAVE system;

3. State Election Board Rule 183-1-6-.06, which provides for documents that qualify as acceptable forms of proof of citizenship and for a hearing process;

4. the revised voter registration application;

5. the notice letter of failure to provide evidence of citizenship;

6. the notice letter to applicants who request a hearing; and

7. the notice letter provided to voters who cast a provisional ballot,

submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on March 23, 2011.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41.

Because the Section 5 status of these changes are before the Court in *State of Georgia* v. *Holder*, 1:10-cv-1970 (D.D.C.), we are providing a copy of this letter to the Court and counsel of record in that case.

Sincerely,

/s/ [Illegible]
T. Christian Herren, Jr.
Chief, Voting Section

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, **Plaintiff,** **v.** **ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,** **Defendant.**	**CIVIL ACTION FILE** **NO. 1:10-CV-1970** **THREE JUDGE PANEL (EGS, RMU, DHG)**

NOTICE OF DISMISSAL

COMES NOW THE STATE OF GEORGIA, by and through its counsel, and dismisses its claims in this case pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i).

For the Court's information, yesterday the State of Georgia obtained administrative preclearance from the Department of Justice for the voting changes at issue in this litigation. A copy of the preclearance letter is attached as Exhibit A.

This 31st day of March, 2011.

/s/ Anne W. Lewis
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[Certificate Of Service Omitted In Printing]

The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010

EXECUTIVE SUMMARY

This report to the United States Congress addresses the impact of the National Voter Registration Act (NVRA) of 1993 on the administration of elections for Federal office during the two-year period following the November 2008 elections through the November 2010 elections. The 2010 report is based on the results of a survey of all States, the District of Columbia, and two territories – American Samoa and Guam[1] Puerto Rico and the U.S. Virgin Islands did not respond to the survey. As with past reports, responses from many States and territories varied significantly: six States and all territories are exempt from the provisions of the NVRA[2] and other States did not collect voter registration data in a way that was compatible with a few of the survey questions. Jurisdictions in a few States faced challenges in

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[1] Throughout this report, EAC uses the word "States" to mean "States, territories, and the District of Columbia."

[2] The six States are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. They are exempt because Election Day Registration was in effect continuously on and after, or enacted prior to, August 1, 1994, or, in the case of North Dakota, have no voter registration at all (42 U.S.C. §1973gg-2(b)). The territories are not subject to the NVRA. These States have an asterisk in the tables included in this report as a reminder that they are exempt from NVRA.

collecting the data, hampering the States' abilities to provide complete data for all jurisdictions.

The survey shows that the number of registered voters decreased during the two years leading up to the 2010 elections after the strong surge in voter registration that occurred prior to the 2008 Presidential election. There were approximately 186.9 million total eligible and registered voters reported for the November 2010 elections, a decrease of nearly 3.6 million registered voters from the 2008 elections.

Puerto Rico, however, did not hold Federal elections in 2010. As such, the lack of reported registration data from Puerto Rico in 2010 somewhat exaggerates the drop in the number of registered voters from 2008 to 2010. There were only approximately 1.1 million fewer registered voters reported for the 2010 elections than for the 2008 elections when excluding Puerto Rico from the 2008 totals. Despite this decrease since 2008, the number of registered voters in 2010 represents an increase of more than 14 million voters since the last midterm elections held in 2006.[3]

According to the responses to the survey and population estimates from the U.S. Census Bureau,

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[3] While data for 2006, 2008, and 2010 are cited for illustrative purposes throughout this report, the 2006 and 2010 elections were midterm elections, which make them more comparable.

85.9% of American citizens of voting age (18 years or older) were registered to vote in the 2010 elections.

A number of States report dramatic increases in active registrants compared to the previous midterm election held in 2006. Since the previous midterm election, 14 States reported an increase of over 10% in the number of active registrants, and two States, Arizona and New Mexico, indicated an increase of over 20%.[4]

Other highlights of the 2010 NVRA study include the following:

- States reported receiving nearly 45.5 million voter registration forms. Use of mail, fax, or email to submit forms was down from the previous election cycle, with 20.9% of registration forms being delivered through these means. Another 14.5% of applications were submitted in person at elections offices, and 37.1% through motor vehicle agencies. Seventeen States reported receiving voter registration applications over the Internet.
- Of the 45.5 million voter registration forms received, nearly 14.4 million of these applications were from new voters who were not previously registered in the local jurisdiction or had not previously registered in any jurisdiction. This

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[4] Active registrants refers to all registered voters except those who have been sent, but who have not responded to a confirmation mailing sent in accordance with NVRA (42 U.S.C. §1973gg-6(d)) and have not since offered to vote.

represents fewer new registrants than in either of the two previous elections – there were 24.6 million new registrants in the 2006 to 2008 election cycle and slightly fewer than 17.3 million new registrants during the 2004 to 2006 election cycle. More than 18.4 million of the registration forms that were submitted requested a change of name, address, or party of the registrant.

- States found invalid or otherwise rejected nearly 1.4 million applications, and almost 2.9 million applications were duplicates of existing registrations. Altogether, 9.4% of registration applications were invalid or duplicates.

- More than 168,000 voter registration applications were "pre-registrations" from people under the age of 18, who were registering under State laws that allow them to pre-register to vote before the age of 18 and vote upon turning 18 (or in a primary if they would be 18 by the general election). This number is down from the 2008 election cycle when 273,000 pre-registrations were processed.

- States sent 14.5 million removal notices to names on their registration rolls pursuant to provisions of the NVRA.

- States removed more than 15 million voters from voter registration lists, for reasons including death, felony conviction, failure to repond [sic] to a confirmation notice and failure to vote in consecutive Federal elections, having moved from one jurisdiction to another, or at the voter's request. More States were able to report the number of

voters that were removed than the number of removal notices that were sent.

- The survey collected information on Election Day Registration, in which voters can register and vote on the same day, either during early voting periods or on Election Day itself. Sixteen States reported adding nearly 2.4 million new registrants to their voter lists on days during which voters could also cast their ballots.

SECTION 1. INTRODUCTION

This report addresses the impact of the National Voter Registration Act of 1993 (NVRA), as amended (Pub. L. No. 103-31, 42 U.S.C. §1973gg-1 et seq.) on the administration of elections for Federal office during the period following the November 2008 Federal elections through the November 2010 elections. It is the ninth in a series of reports submitted biennially pursuant to the provisions of the NVRA, as amended by the Help America Vote Act of 2002 (HAVA), (Pub. L. No. 107-252, 42 U.S.C. §15301 et seq.). The relevant portion of the NVRA reads, in part, as follows:

In general . . . the Election Assistance Commission . . . not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and

other matters affected by this subchapter . . . (42 U.S.C. §1973gg-7(a)(3)).

Although this is the ninth NVRA report to Congress, it is the fourth submitted by the United States Election Assistance Commission (EAC). The previous five reports were submitted by the Federal Election Commission (FEC), which in 1994 promulgated rules identifying the information considered necessary to obtain from the States to generate reports to Congress (11 CFR §9428.7). The FEC described and explained the need for these data elements in a communication to State election officials in October 1995.

With the passage of HAVA, the biennial survey and report were revised and expanded, and the survey has continued to evolve under EAC authority. For the report on the 2004 elections, EAC administered two separate surveys to collect and report the information required under the NVRA and Section §102(c) of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[5] In addition, EAC conducted a third survey to collect other information regarding the November 2009 Federal general elections.

In 2006, EAC incorporated the three collections into a single survey instrument, the 2006 Election

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[5] The Uniformed and Overseas Citizens Absentee Voting Act (1986), EAC is required to collect information under this Act pursuant to 42 U.S.C. §1973ff-1(c).

Administration and Voting Survey, in order to reduce the burden of responding to multiple collections of information, facilitate data collection and reporting, and encourage participation by States. The 2006 survey contained 58 questions; 28 questions required information at only the State level, and 30 questions required information at both the State and local levels.

The 2008 survey contained two different questionnaires, each with its own focus. The first was the Statutory Overview Questionnaire; administered for the first time in 2008, the Statutory Overview asked States about their election laws, procedures, and definitions.[6] EAC designed this survey to provide a valuable overview of election administration in the States and to serve as a reference for evaluating and understanding the quantitative data submitted by the States on the second questionnaire, the Election Administration and Voting Survey (EAVS). The EAVS sought to collect data at the State and local levels on a range of issues, including the NVRA topics presented in this report.

The 2008 edition of the EAVS was the result of discussions with State and local election officials, political scientists, researchers, members of election and voter registration groups, and the public. EAC revised the draft survey following review by EAC's

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[6] A report summarizing results of the 2010 Statutory Overview was released by EAC in spring of 2011.

Standards Board and Board of Advisors,[7] and a public comment period after the survey was published in the Federal Register.

[7] The Standards Board comprises 110 State and local election officials from all of the States and territories, and the Board of Advisors comprises 37 members who represent various national associations, government agencies, and congressional leadership.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV-06-1268-PHX-ROS **ORDER**

On August 6, 2012, the Court issued its order regarding Defendants' handling of voter registrations using the National Voter Registration Form under the National Voter Registration Act (the "Federal Form"). The Court provided general guidance and directed the parties to attempt to reach an agreement on specific issues. The parties were not able to agree and have now submitted competing proposals. Defendants have also moved for reconsideration of certain aspects of the Court's August 6, 2012 Order. Having considered the parties' proposals, Defendants' motion for reconsideration, and the entire record, the Court enters the following Order.

IT IS ORDERED the Motion for Entry of Preliminary Order (Doc. 1071) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Withdraw (Doc. 1072) is **DENIED** based on the failure to comply with Local Rule 83.3.

IT IS FURTHER ORDERED the Motion for Reconsideration (Doc. 1088) is **DENIED**.

IT IS FURTHER ORDERED AS FOLLOWS:

A. Defendants shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under A.R.S. § 16-166(F).

B. For the reasons explained in this Court's Order of August 6, 2012, the Ninth Circuit's decision is retroactive. (Doc. 1082). But in the interest of maintaining the accuracy of the voter registration database, and in the interest of avoiding the imposition of significant hardships on Defendants, retroactive registration of applicants using the Federal Form is limited to forms submitted on or after August 1, 2011.

C. For each voter registration applicant who applied to register to vote on or after August 1, 2011, and who used a Federal Form that was rejected solely due to A.R.S. § 16-166(F), Defendants shall determine whether the applicant was subsequently registered to vote. If not, Defendants shall create a new record for a successful registration of that individual and promptly notify that new registrant of his or her eligibility to vote for candidates for state and federal office.

D. Defendants shall complete the registration required by Paragraph C above on or before August 21, 2012.

E. As previously stated in this Court's order of August 6, 2012, Defendants shall ensure widespread distribution of the Federal Form

through all reasonable channels, including channels the Secretary of State has identified as appropriate for distribution of the State Form. Thus, no later than August 31, 2012 Defendants shall make the Federal Form available where they make the State Form available, including websites.

F. Where Defendants provide paper copies of the State Form they must also provide paper copies of the Federal Form, in both Spanish and English, with the applicable instructions. Defendants need not provide the entire instruction booklet as large portions of that booklet do not apply to Arizona.

G. All state and local employees responsible for processing voter registrations must immediately be informed of the change in the law and instructed to comply with the new procedures.

H. Defendants have not presented the specific changes they propose making to the Secretary of State Election Procedures Manual but some of the changes proposed by Plaintiffs go beyond what is necessary to comply with the law. Defendants will be permitted to make the changes they deem appropriate but they must do so on an expedited basis. Therefore, within sixty days of this Order Defendants shall revise the Secretary of State Election Procedures Manual to reflect compliance with federal law.

DATED this 15th day of August, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 7 - 2012
OFFICE OF THE CLERK

No. 12-71

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA, et al.,
Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., and JESUS M. GONZALEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

---

STATE PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants-Appellees below, are the State of Arizona; Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constabile, in her official capacity as Yavapai County Election Director; Laura Dean–Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official capacity as Graham County Election Director; Donna Hale, in her official capacity La Paz County as Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Linda Haught Ortega, in her official capacity as Gila County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; Lenora Fulton, in her official capacity as Apache County Recorder; Juanita Simmons, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official

capacity as Mohave County Elections Director; Suzanne "Suzie" Sainz, in her official capacity as Santa Cruz County Recorder, Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County Recorder; Sue Reynolds, in her official capacity as Yuma County Election Director. Other parties who have been replaced by succession in office are: Janice K. Brewer, now Governor of Arizona, who was replaced by Ken Bennett; Thomas Schelling, who was replaced by Juanita Simmons, Joan McCall, who was replaced by Carol Meier, Ana Wayman-Trujillo, who was replaced by Leslie Hoffman, Patti Madril, who was replaced by Sue Reynolds, Susan Hightower Marler, who was replaced by Robyn S. Poucette, Gilberto Hoyos who was replaced by Steve Kizer, Linda Haught Ortega, who was replaced by Sadie Tomerlin, Dixie Mundy who was replaced by Linda Eastlick, and Penny Pew, who was replaced by Angela Romero.

Respondents, who were Plaintiffs-Appellants below, are The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; Hopi Tribe; Bernie Abeytia; Luciano Valencia; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote; Common Cause; and Georgia Morrison-Flores.

Other parties before the court of appeals were Candace Owens, Coconino County Recorder, and Patty Hansen, Coconino County Election Director in their

official capacities, as were Laurette Justman, Navajo County Recorder, and Kelly Dastrup, former Navajo County Election Director, in their official capacities.

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INTRODUCTION

This case has been before this Court before, as *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In reversing the Ninth Circuit's error at that time, this Court unanimously emphasized the State's "indisputable" and "compelling interest in preserving the integrity of its election process." *Id.* at 4. This Court also cautioned that fraud in voting pollutes the democratic process by "driv[ing] honest citizens out . . . and breed[ing] distrust of our government." *Id.*

To preserve the integrity of their elections, Arizona voters enacted Proposition 200, which in relevant part requires that voter registration applicants provide evidence of citizenship. Using a new standard for preemption under the Elections Clause that is contrary to this Court's prior decisions, the Ninth Circuit held that the National Voter Registration Act (NVRA) preempted Proposition 200's evidence-of-citizenship requirement.

Under the new standard, the Ninth Circuit emphasized that "courts deciding issues raised under the Elections Clause need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." (Pet. App. 16c [emphasis added].) Therefore, although the Ninth Circuit did not find that there was an actual conflict between Proposition 200's evidence-of citizenship requirement and the provision in the NVRA that requires the States to "accept and use" the mail-in registration form (the Federal Form) created by the Electoral Assistance Commission (EAC), it found Proposition 200's requirement invalid. That

decision was mistaken on multiple levels. Actual conflict between federal and state law is the cornerstone of preemption under the Elections Clause, just as it is under the Supremacy Clause. In *Ex Parte Siebold*, 100 U.S. 71 (1879), a case decided under the Elections Clause, this Court held that a state election law is preempted when it "conflicts" with federal law, and only "so far as the conflict extends," *id.* at 384, and "no further," *id.* at 386. This Court's later Elections Clause cases followed this precedent. And there is no conflict between the NVRA and Proposition 200, either as to the language or as to the goals and purposes of the NVRA.

The NVRA and the EAC's regulations expressly contemplate that the Federal Form will reflect state-specific registration requirements, and the EAC in practice includes a wide variety of state-specific requirements in the Federal Form. Nothing in the NVRA or the EAC's regulations excludes evidence of citizenship from the requirements a state may impose or that may be incorporated into the Federal Form. Indeed, the NVRA's express purpose includes increasing the number of "eligible" voters and "protecting the integrity of the electoral process." The Ninth Circuit nonetheless found Proposition 200 preempted. The court construed the NVRA's requirement that States "accept and use" the Federal Form application as a requirement to assess the applicant's eligibility based only on the information requested on the Federal Form. This is contrary to the ordinary meaning of that phrase and would lead to the absurd and impossible result that a commissioner who had absolute documented proof that an applicant was

not a citizen would nevertheless have to register that applicant if the proof were external to the application. To "accept and use" a form application in any other context merely means that the application is used to determine whether the applicant is eligible for and entitled to receive what he or she has applied for. (For example, an employer may "accept and use" a form employment application to assess candidates for an open position. But clearly "accepting and using" a form from qualified individuals does not entitle all applicants to a job merely because they filled out the form completely.) As Judge Kozinski observed, "it's entirely possible to accept and use something for a particular purpose, yet not have it be sufficient to satisfy that purpose." (Pet. App. 96a). "A minute's thought comes up with endless [other] examples: passport and visa, car registration and proof of insurance; boarding pass and picture ID. . . ." (Pet. App. 97a).

If the phrase "accept and use" as set forth in the NVRA is construed in accordance with its plain meaning (as it should be), there is no conflict between the NVRA's language and Arizona's requirement that applicants supply some evidence of citizenship with their voter registration forms. A store may "accept and use" credit cards to transact business and nevertheless demand photo identification at the point of sale. In the same way, Arizona "accepts and uses" the Federal Form to process applications from those seeking to register. The requirement that applicants provide additional evidence to support their application does not constitute a "rejection" of the Federal Form any more than an identification check at an airport gate

entrance constitutes a "rejection" of a passenger's ticket.

By ignoring the ordinary meaning, the Ninth Circuit in effect applied a presumption in favor of preemption. Because Arizona "accepts and uses" the Federal Form and the NVRA does not preclude Arizona from requiring that registrants include evidence of citizenship as well, there is no direct conflict. Therefore, the NVRA does not preempt Proposition 200's evidence-of-citizenship requirement.

OPINIONS BELOW

The en banc decision of the Court of Appeals for the Ninth Circuit is reported at 677 F.3d 383 (9th Cir. 2012) (Pet. App. 1c-122c). Other opinions of the Ninth Circuit are included in the Petition Appendix at 1a-106a and 1d-21d. The Ninth Circuit's en banc decision reviewed the decision of the U.S. District Court for the District of Arizona granting summary judgment to the Petitioners (Pet. App. 1e-10e) and the district court's decision denying Respondents' relief on all remaining claims. (Joint Appendix [JA] at 246 to 319.)

JURISDICTION

The court of appeals entered judgment on April 17, 2012. (Pet. App. 4c.) The petition for certiorari was filed within ninety days of April 17, 2012. Accordingly, this Court's jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Article I, Section 2, Clause 1 of the U.S. Constitution provides:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

Article 1, Section 4, Clause 1 of the U.S. Constitution provides:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Seventeenth Amendment to the U.S. Constitution provides:

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each state shall have the qualifications requisite

> for electors of the most numerous branch of state legislatures.

Article II, Section 1, Clause 2 of the U.S. Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in the Congress. . . .

Section 1973gg-4 of the National Voter Registration Act, 42 U.S.C. § 1973gg-4, provides in relevant part:

> Mail registration
>
> (a) Form
> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

Section 1973gg-7 of the National Voter Registration Act, 42 U.S.C. § 1973gg-7, provides in relevant part:

Federal coordination and regulations

(a) In general The Election Assistance Commission --

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form.

The mail voter registration form developed under subsection (a)(2) of this section –

(1) May require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that --

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(5) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(i) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

> (ii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration will remain confidential and will be used only for voter registration purposes.

The entire text of the National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-7, is reproduced in the Petition Appendix at 1h-28h.

Arizona Revised Statutes (A.R.S.) Section 16-166:

> F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
>
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship

to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

(The complete text of A.R.S. § 16-166 is reproduced in

the Petition Appendix at 46h-50h.)

STATEMENT OF THE CASE

I. The National Voter Registration Act of 1993.

Congress enacted the NVRA in 1993 with the primary objectives of

> [1] "increas[ing] the number of *eligible* citizens who register to vote for Federal office;" [2]"mak[ing] it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;" [3] "protect[ing] the *integrity* of the electoral process; and [4] "ensur[ing] that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b)(1)-(4) (emphasis added) (The complete text of the NVRA is reprinted in Pet. App. 1h-42h.)

In furtherance of the NVRA's goals, Congress requires States to accept three different kinds of voter registration applications from those wishing to register to vote in federal elections. First, the NVRA requires States to treat any application for a driver's license submitted to the state motor vehicle department "as an application for voter registration with respect to elections for federal office (the Motor Voter Form"). 42 U.S.C. § 1973gg-3(a)(1). Second, the NVRA permits

voters to submit their application via mail through the use of "the mail voter registration application form." 42 U.S.C. § 1973gg-4(a)(1). Lastly, individuals may apply "in person at the appropriate registration site designated . . . in accordance with State law." 42 U.S.C. § 1973gg-2(a)(3).

With respect to registrations submitted by mail, the NVRA directs the States to "accept and use the mail voter registration application form prescribed by [the U.S. Elections Assistance Commission] for the registration of voters in elections for Federal Office" ("the Federal Form"). 42 U.S.C. § 1973gg-4(a)(1). The contents of the Federal Form are governed by Section 1973gg-7(b). "In addition," individual States may also "develop and use a mail voter registration form that meets all of the criteria" required for the Federal Form in subsection 1973gg-7(b). 42 U.S.C. § 1973gg-4(a)(2). This form "may require only such identifying information . . . and other information as is necessary to enable the appropriate state elections official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

A. Congress Delegated a Limited Role to the U.S. Election Assistance Commission—That Is, to Develop the Federal Form.

Congress prescribed the specific information that *may* be required, the information that *must* be required, and the information that must *not* be required on the Federal Form and any individual state counterpart that might otherwise be used. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA explicitly provides

that the Federal Form "*may require* only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg-7(b)(1) (emphasis added). The NVRA also provides that the Federal Form "*shall include*" statements that specify each eligibility requirement (including citizenship), contain an attestation of eligibility, and require the applicant's signature under penalty of perjury. *Id.* § 1973gg-7(b)(2) (emphasis added). Lastly, the NVRA provides that the forms developed for voter registration "*may not include* any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3) (emphasis added).

While the U.S. Election Assistance Commission (EAC) is responsible for creating the Form, Congress explicitly denied the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits the EAC to develop the Federal Form, and "provid[e] information to the States with respect to the responsibilities of the States under [the NVRA]."

B. The EAC Developed a Federal Form that Includes State-Specific Instructions and Revises It As State Election Laws Evolve.

There are three "components" to the Federal Form:

the general application instructions, the form itself, and the state-specific instructions. (Pet. App. 60c-84c [Appendix to Opinion].) The state-specific instructions account for seventeen pages of the twenty-five page Federal Form. Nearly all of the state-specific instructions require that the registrant provide specific identifying information on the Federal Form. For example, to register in California, "you must provide your California driver's license or California identification card number." (*Id.* at 68c.) In Hawaii, "[y]our full social security number is required." (*Id.*at 71c.) And "Michigan law requires that the same address be used for voter registration and driver license purposes." (*Id.* at 75c.) The state-specific instructions also include additional eligibility requirements that vary from state to state. As its instructions clearly indicate, a person cannot complete the Federal Form without referencing and meeting the widely varied, state-specific requirements, as well as attesting to eligibility. (*Id.* 63c).

The EAC's regulations include "state-specific instructions" as a mandatory "component" of the Federal Form. *See* 11 C.F.R. § 9428.3(b). The regulation further requires that "[t]he state-specific instructions shall contain . . . information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b). The EAC requires that state election officials report and update it on the State's unique "voter registration eligibility requirements" for the purpose of including and updating any requirements set forth in the "state specific" component of the Federal Form. 11 C.F.R. § 9428.6. Updating the Federal Form with new or

additional state-specific registration requirements is primarily a ministerial task, which the EAC has largely delegated to its staff: "EAC staff routinely fields requests from states to update or change their state-specific instructions, which are part of the National Form." (*See* EAC Operation Policy; Statement of Paul DeGregorio at 1 [JA at 223].)

II. The Passage and Implementation of Proposition 200.

A. Arizona Voters Pass Proposition 200 Due in Part to Concerns About Ineligible Voters Registering and Voting in Elections.

Due at least in part to concerns about the "increase in non-citizens registering to vote and actually voting in elections,"[1] Arizona voters passed a ballot initiative called Proposition 200), which asks prospective voters to provide evidence of U.S. citizenship in order to register to vote. (The portion of Proposition 200 that addresses registration is codified at A.R.S. § 16-166(F), which is set forth in Pet. App. 42h-50h.) Proposition 200 also requires registered voters to present identification in order to cast their ballots at the polls. A.R.S. § 16-579.

Arizona, like other States, has experienced fraud in voting with regard to both registration and casting ballots. (JA 99, 117, 267-68, 336-39). For example, in

---

[1] This Court recognized the States' legitimate concern with voter fraud in *Purcell*, 549 U.S. at 4.

2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner they were not U.S. citizens. (*Id.* at 267.) Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now ("ACORN") submitted "garbage" voter-registration forms and had misled noncitizens into registering to vote. The Maricopa County Recorder testified:

> It was enormous amounts of voter registrations that were – and there is no other term for it other than garbage, these were scrawled, they were -- they were not whole addresses, these were not real people, Nacho Cheese, that type [of] thing. . . . And they were getting paid for it.
>
> So we had them in on many occasions. On one particular occasion, we had gotten a group in . . . and there were 24 that said, "I am not a citizen." We drug them back in and asked them to bring their lawyers to say, "Do you understand that if I put these on file, these people have committed a felony?" I believed then and I believe now that it is not the person who is doing this, but the person who is getting them to do this in order to make their money.

(*Id.* at 340-41.)

B. The U.S. Department of Justice Precleared Proposition 200 as Compliant with the Voting Rights Act.

Following Arizona voters' enactment of Proposition 200, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. (*Id.* at 193, 248). Arizona specifically stated that the measure would require applicants registering to vote to provide evidence of United States citizenship with the application. (Pet.App. 6e-7e.) Arizona had the burden of showing that Proposition 200's "new voting policy did 'not have the purpose [or] effect of denying or abridging the right to vote on account of race or color.'" *Purcell*, 549 U.S. at 3 (quoting 42 U.S.C. § 1973(c). The Department of Justice precleared the measure on January 24, 2005. (JA 193.)[2]

C. Arizona Requested an Amendment to the Federal Form to Avoid Voter Confusion, Which the EAC Rejected.

After receiving preclearance from the Department of Justice, Arizona submitted a request to the EAC to include Arizona's evidence-of-citizenship requirement on the state-specific instructions for the Federal Form. (*Id.* at 181.) The then-EAC Executive Director declined to approve this state-specific requirement.

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[2] The Department precleared a subsequent similar law after the State of Georgia filed suit in the district court of the District of Columbia. (JA 342-72.)

(*Id.* at 181-82.) The EAC Commissioners themselves apparently had no involvement in the decision. Rather, the Director made the decision unilaterally. (*See, e.g., id.* at 223). The Director claimed that the voter approved measure was "preempted by Federal law." (*Id.* at 186.) According to the Director, "[a]ny Federal Registration Form that has been properly and completely filled-out by a *qualified* applicant and timely received by an election official must be accepted in *full satisfaction* of registration requirements." *Id.* (emphasis added). It would follow from this reasoning that even if state officials had documentary proof that the applicant was not a citizen and therefore was not a qualified applicant, the application would have to be accepted.

One day after the district court issued its opinion denying the Plaintiffs' application for a temporary restraining order and concluding that NVRA did not preempt Proposition 200, Arizona requested that the EAC reconsider. (*Id.* at 216-22.) A vote on that request resulted in a deadlock, as two Commissioners voted in favor of amending the instructions and two voted against it. (*Id.* at 225.) Director Wilkey's original decision was permitted to stand and the Federal Form has not been amended. "Any action" taken by the EAC, however, "may be carried out only with the approval of at least three of its members." 42 U.S.C. § 15328. Here, the EAC Director was not performing the ministerial task of adding state-specific requirements, but making a legal determination about the validity of the state-specific instructions. Yet three Commissioners never approved the Director's legal determination about the validity of Arizona's evidence-

of-citizenship requirement. Currently, the EAC has *no* active commissioners and has not maintained even three members since 2010. The two remaining Commissioners both resigned in late 2011 along with Director Wilkey.[3] In May 2012, the EAC's general counsel and default interim executive director also resigned.[4]

D. Arizona Election Officials Implemented Proposition 200's Evidence-of-Citizenship Requirement in 2006.

Proposition 200 permits a variety of options to satisfy its evidence-of- citizenship requirement. A.R.S. § 16-166(F). In most instances, providing evidence of citizenship is accomplished by writing an identifying number on a postcard registration form, including an Arizona driver's license or non-operating identification number issued after October 1, 1996. A.R.S. § 16-166(F)(1). Approximately ninety percent of voting-age Arizonans possess driver's licenses (JA 257).

Applicants may also write the "A-number" located on their certificate of naturalization on their postcard registration form. A.R.S. § 16-166(F)(4). Applicants

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[3] *See* Commissioner Gineen Bresso's 12/8/2011 Resignation Letter, *available at* http://www.eac.gov/assets/1/Documents/Bresso%20Resignation1.pdf; Commissioner Donetta L. Davidson's 11/30/2011 Resignation Letter, *available at* http://www.eac.gov/assets/1/Documents/Davidson%20resignation%20letter%20to%20President%20Obama1.pdf.

[4] See EAC Employee Directory, available at http://www.eac.gov/about_the_eac/staff.aspx.

may also provide their tribal identification number. A.R.S. § 16-166 (F)(6). For the very few applicants who do not have any of these numbers, they can provide copies of other documents such as birth certificates, passports, naturalization documents, or "other documents that are meant as proof that [may be] established pursuant to" federal immigration law. (Pet. App. 9d (quoting A.R.S. § 16-166(F)(5)). Originals are not required. *See* A.R.S. § 16-166(F).

E. Arizona Continues to Accept and Use the Federal Form.

Following the implementation of Proposition 200, Arizona has continued to accept the Federal Form and for voter registration purposes. (JA 190.) The Arizona Secretary of State continually makes the Federal Form available to anyone who requests it. (*Id.* at 191.) In addition, that form is publicly available for downloading and printing on the EAC's website. (*Id.* at 191.) Before the district court's injunction following remand from the Ninth Circuit (*Id.* at 381-84), when an Arizona applicant provided the Federal Form, county recorders evaluated the application, determined if it provided satisfactory evidence of citizenship, and sent correspondence to any applicant who did not provide adequate information indicating what information was necessary to complete the application process. (*See* JA 251; *see also* Arizona Secretary of State's Procedures Manual, at 9-14, *available at* http://www.azsos.gov/election/electronic_voting_system/manual.pdf.) In other words, submission of the Federal Form without the requisite evidence of citizenship does not result in denial; instead, officials respond with a request that

the applicant supply evidence of citizenship.

III. Procedural History

After the voters passed Proposition 200, several Plaintiffs brought overlapping Complaints in the United States District Court for the District of Arizona to prevent its implementation. (Pet. App. 7c.) The district court, following briefing and an evidentiary hearing, denied preliminary relief. (Pet. App. 1f-3f.) A two-judge motions panel of Ninth Circuit reversed the district court and granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006). This Court reversed. *Purcell*, 549 U.S. at 8.

On remand, a panel of the court of appeals affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the State from requiring evidence of citizenship. (Pet. App. 16d-17d) (*Gonzalez v. Arizona I*). Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the district court granted the State's motion for summary judgment on the NVRA claim. (Pet. App. 3e). Following a trial on the remaining claims, the district court granted judgment in favor of the State. (Pet. App. 8c.) The district court found that the burdens on potential registrants were not excessive. (JA 288-94.) The district court also found that voter fraud, the basis for Proposition 200, was a significant problem. (*Id.* at 294-95.)

Plaintiffs appealed. (Pet. App. 9c). A divided second panel of the Ninth Circuit Court of Appeals disagreed with *Gonzalez I* and reversed the district court's summary judgment ruling on the NVRA claim, affirming the district court's decision on the remaining claims. (Pet. App. 1a-96a) (*Gonzalez v. Arizona II*). The State petitioned for and received rehearing en banc. (Pet. App. 1b-6b).

In another divided opinion, the en banc court concluded that the NVRA preempts Proposition 200 as applied to the Federal Form. (Pet. App. 1c-122c) (*Gonzalez v. Arizona III*). The court reasoned that the Election Clause "empowers both the federal and state governments to enact laws governing the mechanics of federal elections." (*Id.* at 13c.) The court determined that because the Election Clause permits Congress to "'conscript state agencies to carry out' federal mandates," it "operates quite differently from the Supremacy Clause." (*Id.* at 14c-15c(quoting *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)). The court concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." (*Id.* at 16c (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))). Instead, the court determined that the Election Clause "establishes its own balance" and that the "presumption against preemption" and "plain statement rule" that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (*Id.*)

The Ninth Circuit's new test for analyzing elections preemption does not require an actual conflict between

state and federal law. Under its newly created preemption analysis, the court determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." (*Id.* at 20c). It then concluded that because of the evidence-of-citizenship requirement, Arizona did not "'accept[] and us[e]' the Federal Form," and therefore Arizona's requirement was preempted "when applied to the Federal Form." (*Id.* at 31c, 43c.)

Chief Judge Kozinski concurred, but observed the following:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

(Pet. App. 89c.)

Judges Rawlinson and Smith dissented. The

dissent disagreed with the majority's interpretation of the Elections Clause, finding that it was not supported by this Court's decisions. (Pet. App. 116c-121c.) They noted that this Court's Elections Clause decisions "emphasize the respect that should be accorded the procedures implemented by states," clarify that "preemption extend[s] only as far as a conflict exists," and hold that "a conflict exists only if the [state and federal] regulations cannot co-exist." (*Id.* at 116c, 121c.) The dissent therefore concluded that "[b]ecause the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause." (*Id.* at 121c.)

The dissent articulated several reasons, supported by the NVRA itself, that there was no conflict. For example, drawing on an analogy first articulated by Chief Judge Kozinski in an earlier opinion in this case (Pet. App. at 96a-97a), the dissent observed:

> [A]ccepting and using something does not mean that it is necessarily sufficient. For example, merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card.

(Pet. App. at 105c.)

The dissent further found that § 1973gg-7(b)

expressly "permits states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" (*Id.* at 107c (quoting 42 U.S.C. § 1973gg-7(b)(1); alterations in dissenting opinion). The dissent stated that Congress could not have intended that the States are prohibited from asking for additional information to verify that applicants are citizens because the NVRA expressly allows the States to develop their own forms as long as they comply with 42 U.S.C. § 1973gg-7(b). (*Id.* at 109c-110c.) Consequently, the dissent concluded that Arizona did not defy "the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form." (*Id.* at 106c.)

On remand and after a full trial, the district court found that the burdens on potential registrants were not excessive. (JA 288-94.) Plaintiffs were able to produce only "one person . . . who [was] unable to register to vote due to Proposition 200's evidence of citizenship requirement" and did not "demonstrate [] that . . . persons rejected are in fact eligible to register to vote." (*Id.* at 292.) The district court found that Proposition 200 had a valid basis that is, that voter fraud had indeed infected the voter registration process in Arizona. (*Id.* at 292.) The district court also found that Proposition 200 has not burdened those eligible citizens wishing to register from exercising their fundamental right. (*Id.* at 294.)

SUMMARY OF ARGUMENT

1. The Ninth Circuit applied a new, unprecedented preemption test to find that the NVRA preempts Arizona from requiring that evidence of citizenship accompany an applicant's federal voter registration form. In effect, the Ninth Circuit replaced ordinary preemption principles with a unique presumption in favor of preemption for cases decided under the Elections Clause. This new test is contrary to this Court's precedent under the Elections Clause and the Supremacy Clause.

The Elections Clause grants States explicit authority to manage procedures for federal elections and this Court has long held that if Congress seeks to alter the States' procedures, such federal regulations supplant state regulations only to the extent of a conflict. This Court's Elections Clause preemption analysis is entirely consistent with this Court's preemption analysis under the Supremacy Clause. In contrast, the Ninth Circuit's preemption test implies that Congress's laws should preempt a state law that addresses the same subject matter even if there is no actual conflict between the state and federal law and regardless of any of the factors that govern conflict preemption.

2. The Ninth Circuit's preemption conclusion focused on the NVRA requirement that States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). Under ordinary conflict preemption principles and by following traditional canons of statutory construction, the NVRA's requirement that States "accept and use" the Federal Form and Arizona's evidence-of-citizenship requirement can easily coexist.

It is undisputed that the NVRA contemplates that States can require voter registration applicants using the Federal Form to provide state-specific "information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). The mere requirement that an applicant provide state-specific information is entirely consistent with the NVRA. And there can be no serious dispute that the NVRA by its terms allows States to include in their state-specific requirements that applicants submit evidence of citizenship to allow the State "to assess the eligibility of the applicant." By reading Section 1973gg-4(a)(1)'s "accept and use" language in isolation instead of in conjunction with Section 1973gg-7(b)(1), the Ninth Circuit violated the basic canon of statutory construction that related statutory provisions are to be read together.

In addition, the ordinary meaning of the phrase "accept and use," especially as used in connection with a form application, is consistent with Arizona's requirement that applicants also provide evidence of eligibility to vote. Just as prospective employers may "accept and use" a form application to consider qualified candidates and also require a writing sample, Arizona may "accept and use" the Federal Form and also require evidence of citizenship.

Moreover, the NVRA forbids States from requiring "notarization or other formal authentication" in connection with the Federal Form. 42 U.S.C. § 1973gg-7(b)(3). Under the *expressio unius* canon of construction, Congress's specific exclusion of one

requirement creates the inference that other such requirements, such as evidence of citizenship, are not excluded.

Finally, the Ninth Circuit incorrectly gave deference to EAC's failure to include Proposition 200's evidence-of-citizenship requirement in Arizona's state-specific instructions. The EAC's decision declining to include Arizona's requirement was not a result of a majority vote of the EAC Commissioners and certainly the decision was not subject to formal rulemaking following notice and comment. Instead, the decision was nothing more than the whim of an EAC administrator.

3. Any doubts concerning whether the NVRA preempts Proposition 200 should be resolved in favor of finding no preemption under the canon of constitutional avoidance. The States have the exclusive authority to determine and enforce voter qualifications in federal elections under the Voter Qualifications Clauses of the Constitution. If this Court interprets the NVRA as preempting Proposition 200's evidence-of-citizenship requirement, it will raise a serious question concerning the constitutionality of the NVRA under the Voter Qualifications Clauses. To avoid that collision, this Court should interpret the NVRA as not preempting Proposition 200.

ARGUMENT

I. The Ninth Circuit Erred in Applying Preemption Principles Under the Elections

Clause that Are Different from Supremacy Clause Preemption Principles.

The Ninth Circuit concluded that the "Elections Clause operates quite differently from the Supremacy Clause." (Pet. App. 15c.) The court emphasized that "courts deciding issues raised under the Elections Clause need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." (Pet. App. 16c [emphasis added].) It abandoned the principles traditionally governing preemption and fashioned a new approach.

According to this newly invented test, a state law is preempted if it does not "operate harmoniously in a single procedural scheme" with a state law that "address[es] the same subject." (Pet. App. 20c.) The Ninth Circuit erred in applying this newly invented test because it is inconsistent with *Siebold* where this court held that a federal law enacted under the Elections Clause did not preempt a state law addressing the same subject unless there wass an actual conflict between the two laws and even then, preemption extended only "so far as the conflict extends," 100 U.S. at 384, and "no further," *id.* at 386.[5]

Under the *Siebold* test, the issue is whether state

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[5] This argument assumes that the Elections Clause authorized Congress to enact the NVRA as applied here. The Ninth Circuit's decision, however, also raises a serious question concerning whether the NVRA's application here interferes with the States' excusive authority to define the qualifications for voting in federal elections. See § 1(C) *infra*.

officials can comply with both Proposition 200's evidence-of-citizenship requirement and the NVRA's requirement that they "accept and use" the Federal Form. If state officials can comply with both, there is no conflict between the laws. That test is met in this case.

The Elections Clause expressly authorizes the States to establish the times, places, and manner of congressional elections, subject to superseding regulation by Congress:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. I, § 4, cl.1.

In *Siebold*, this Court applied concepts essentially identical to modern preemption doctrine under the Supremacy Clause to describe preemption under the Elections Clause. In *Siebold*, the petitioners challenged their prosecutions for violations of a federal statute that criminalized certain conduct that interfered with federal elections. *Id.* at 378-82. This Court rejected petitioners' argument that if Congress enacted regulations under the Elections Clause, those regulations "must take the place of all State regulations of the subject regulated." *Id.* at 383.

This Court recognized that the Elections Clause provided "concurrent authority of the *two sovereignties, State and National,* over the same subject-matter." *Id.* at 384-85 (emphasis added); c.f. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."). The *Siebold* Court analogized Congress's Elections Clause authority with its Commerce Clause authority over interstate commerce, as both provide "concurrent authority of the State and national government, in which that of the latter is paramount." 100 U.S. at 385.

Unlike the Ninth Circuit's new approach to preemption, under *Siebold* a state election law is preempted when it "conflicts" with federal law and, even then, preemption extends only "so far as the conflict extends," *id.* at 384, and "no farther" *id.* at 386. *Siebold* further instructed that, when considering a question of preemption under the Elections Clause, courts "are bound to *presume* that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any *unnecessary* interference with State laws and regulations, [or] with the duties of State officers." *Id.* at 393 (emphasis added).

Put in modern preemption parlance, that means "in *all* preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] start[s]

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added; internal quotation marks omitted). For purposes of preemption, then, a conflict arises "if both" the state and federal laws at issue "cannot be performed." *Siebold*, 100 U.S. at 386. Under *Siebold*, a federal regulation affecting the administration of elections "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395.

More recently, this Court followed *Siebold* and applied Supremacy Clause preemption principles in *Foster v. Love*, 522 U.S. 67 (1997). In *Foster*, this Court considered whether federal statutes setting a uniform date for federal elections preempted a Louisiana open primary system that allowed for conclusive congressional elections in October, in advance of the national November election date. This Court observed that the "Fifth Circuit's conception of the issue here as a narrow one turning entirely on the meaning of the state and federal statutes is exactly right," *id.* at 71, and that "[w]hen Louisiana's statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void," *id.* at 74. In affirming the Fifth Circuit's analysis as "exactly right," this Court affirmed the Fifth Circuit's application of preemption principles under the Supremacy Clause. *See Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996) (applying the test for conflict preemption under the Supremacy

Clause and concluding that "the Louisiana election system . . . must yield under the Supremacy Clause").[6]

Nothing in the Court's analysis in *Foster* suggests that the Court did not find an actual conflict between state and federal law or that it used a more vague "same subject matter" approach to preemption under the Elections Clause. Rather, *Foster* reiterated that federal elections laws are paramount where they conflict with state law and only "so far as the conflict extends." *Foster*, 522 U.S. at 69 (*quoting Siebold*, 100 U.S. at 384).

II. UNDER ORDINARY CONFLICT PREEMPTION PRINCIPLES, THE NVRA DOES NOT PREEMPT PROPOSITION 200'S EVIDENCE-OF-CITIZENSHIP REQUIREMENT.

The only form of preemption even potentially applicable here is conflict preemption, which "includes cases where compliance with both the federal and state regulations is a physical impossibility and those

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[6] The Ninth Circuit relied on *Foster* for its conclusion that preemption under the Elections Clause operated differently than preemption under the Supremacy Clause, noting that "instead of adopting the Fifth Circuit's Supremacy Clause analysis, the Court analyzed the claim under the Elections Clause, without ever mentioning a presumption against preemption or a plain statement rule." (Pet. App. 17c.) The Court did not need to apply those rules in *Foster*, however, because it found that no possible interpretation of "federal election day" permitted Louisiana's open primary law that allowed congressional candidates to be elected a month before the federal election day. 552 U.S. at 70-72. Therefore, there was no reason for the Court to invoke the presumption against preemption or the plain statement rule.

instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal citations and quotation marks omitted);[7] *see also Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) (under conflict preemption, the challenger must "present a showing of . . . conflict between a particular local provision and the federal scheme, *that is strong enough* to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation") (emphasis added). Under that test, Arizona's evidence-of-citizenship requirement is not preempted. It is undisputed that the NVRA allows the States to require the inclusion of state-specific information on the Federal Form. And requiring evidence of citizenship as part of such state-specific information submitted in connection with the Federal Form does not conflict with the NVRA.

Finally, the EAC's failure to include Arizona's evidence-of-citizenship requirement in the state-specific instructions on the Federal Form carries no preemptive force, because Congress did not give the EAC the authority to preempt state law. Further, because a majority of the EAC's Commissioner's did not vote to reject the inclusion of Proposition 200's

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[7] Other types of preemption not relevant here are express preemption, in which Congress expressly preempts States' authority to regulate, and field preemption, in which Congress comprehensively occupies the field of a given area to the exclusion of the States. *See id.* at 2501.

requirement, the EAC's rejection is invalid.

A. The NVRA Does Not Preclude States from Requiring that Applicants Supply State-Specific Information with the Federal Form.

It is undisputed that the NVRA contemplates that the States may require that applicants provide state-specific information with the Federal Form. Section 42 U.S.C. § 1973gg-7 provides that the Federal Form "may require only such identifying information (including the signature of the applicant) *and other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added).

Consistent with the statutory requirement that the Federal Form requires that applicants submit such "other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant" under state-specific qualifications, the EAC's regulations expressly contemplate that the States can require state-specific information on the Federal Form. The EAC's own regulations define the term "form" as "the national mail voter registration application form, *which includes* the registration application, accompanying general instructions for completing the application, and *state-specific instructions*." 11 C.F.R. § 9428.2(a) (emphasis added). Accordingly, of the twenty-five pages comprising the Federal Form, seventeen pages are devoted exclusively to a description of the "state-

specific" criteria for voter registration. The Federal Form requires all applicants to "review [their] state's instructions" and to "swear/affirm" that they "meet the eligibility requirements of [their] state." (Pet. App. 63c at Box 9.)

As the sheer length of the state-specific instructions suggests, States have adopted widely varied identification and eligibility requirements beyond what is minimally required of applicants by the Federal Form. (Pet. App. 67c-89c.) The EAC's inclusion of such widely varied, state-specific instructions as a "component" of the Federal Form belies the claim that the NVRA preempts all state requirements that seek additional or supplemental evidence to support a voter registration application. To the contrary, the EAC has generally included all state-specific registration criteria as a matter of course so long as they do not conflict with any of the NVRA's express prohibitions.

The EAC's practice of including state-specific requirements in the Federal Form dates back to the early implementation of the NVRA by its predecessor, the Federal Election Commission (FEC). Immediately following its enactment, the FEC issued detailed implementation guidelines.[8] In so doing, the FEC meticulously reviewed the text of the NVRA as well as its legislative history and highlighted Congress's desire to avoid a construction of the NVRA that would

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[8] FEC Guide to Implementing the NVRA, *available at http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%20Jan%201%201994.pdf.*

displace the role of state officials with respect to voter registration. *Id.* (citing House Report, Section 5 at 8, providing that "[t]his bill should not be interpreted in any way to supplant [the] authority" of state officials to "make determinations as to applicants' eligibility"). The FEC was careful to distinguish between the submission of a registration *application* and voter registration itself—"an application received by the local voter registration official is *only* an application and may be subject to whatever verification procedures are currently applied to all applications." *Id.*

In short, it is undisputed here that it is possible for state officials to require applicants to submit state-specific information in connection with the Federal Form and that doing so does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2505.

B. The NVRA Does Not Preclude States from Including Evidence of Citizenship as Part of the State-Specific Information that Applicants Are Required to Submit with the Federal Form.

Putting aside for the moment the EAC's attempt to control the content of the state-specific instructions included on the Federal Form, there can be no serious dispute that that the NVRA *on its own terms* allows the States to include evidence of citizenship in the state-specific information applicants are required to submit with the Federal Form.

First, the NVRA explicitly provides that the

Federal Form may require such "other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). As this Court has observed, this statutory language leaves the "policy choice" to the States by not listing "all the other information the State may—or may not—provide or request" in determining voter eligibility. *Young v. Fordice*, 520 U.S. 273, 286 (1997). It is precisely because the NVRA left this "discretionary" policy choice open to the States that the choices made by covered jurisdictions are subject to preclearance under the Voting Rights Act. *Id.* Indeed, Arizona as a covered jurisdiction, submitted its evidence-of-citizenship requirement for preclearance under the Voting Rights Act, and the Justice Department precleared it. In order to obtain preclearance, Arizona had the burden of showing that Proposition 200's "new voting policy did 'not have the purpose [or] the effect of denying or abridging the right to vote on account of race or color.'" *Purcell*, 549 U.S. at 3 (quoting 42 U.S.C. § 1973(c)).

Second, the NVRA specifically forbids States from including "any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). Generally, under the doctrine of *expressio unius est exclusio alterius*, a statute that explicitly prohibits one thing does not implicitly prohibit another. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (such a legislative decision represents "'deliberate choice, not inadvertence'") (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)); *see also Gonzalez II*, Pet. App. 98a ((Kozinski, J., concurring in part and dissenting in part) ("The inclusion of a specific

prohibition is a strong indication that other prohibitions weren't intended."). In expressly forbidding only a requirement of notarization or authentication, Congress left open other "policy choice[s]" for States to make in requiring applicants to demonstrate their qualification to vote. *Young*, 520 U.S. at 286.

Finally, Section 1973gg-4(a)(2) allows the States, "in addition to accepting and using the [Federal Form]," to develop and use a mail voter registration form *that meets all of the criteria* stated in section 1973gg-7(b) of this title for the registration of voters in federal elections." 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Arizona's state form developed pursuant to this authority requires evidence of citizenship. If Congress did not prohibit States from requiring applicants to submit evidence of citizenship when using the state form to apply for registration, then Congress could not have intended to prohibit applicants to submit the same information when using the Federal Form to apply for registration, because the statute employs the same substantive standards for *both* forms. *See* 42 U.S.C. § 1973gg-4(a)(2); *id.* -7(b).

C. Arizona "Accepts and Uses" the Federal Form for Purposes of § 1973-gg-4(a)(1) by Requiring that Evidence of Citizenship Be Submitted with the Federal Form As Permitted by § 1973-gg-7(b)(1).

Given their ordinary meaning, the words "accept and use" in § 1973gg-4(a)(1) do not require Arizona to treat the Federal Form conclusive of voter eligibility

upon submission without allowing verification from outside sources. The word "accept" ordinarily means "to receive willingly" or "to be able or designed to take or hold."[9] In turn, "to use" means "to employ" or "to derive service from." *Smith v. United States*, 508 U.S. 223, 228-29 (1993). Because the words "accept and use" are not defined in the NVRA, the Court construes them in accordance with their ordinary meaning and in light of the terms that surround them. *Id.* at 228.

An airline may advertise that it "accepts and uses" e-tickets and that paper tickets are not needed, yet may still require photo identification before one could board the airplane. Prospective employers may "accept and use" a form application to consider qualified candidates, but still decline to give some of those applicants a job. Similarly, Arizona "accepts" the Federal Form by receiving it willingly and "uses" the form by employing it as a tool to verify voter eligibility. Moreover, Arizona officials notify applicants who have not provided satisfactory evidence of citizenship and give them the opportunity to supply that information.

Using the Federal Form to deny registration to those who have not provided evidence of citizenship is also fully consistent with Section § 1973-gg-7(b)(1), which expressly authorizes Arizona to "require . . . information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973-gg-7(b)(1). In interpreting a statute, a court "will not look merely to a

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[9] http://www.merriam-webster.com/dictionary/accept

particular clause in which general words may be used, but will take in connection with it the whole statute." *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 573 (1989) (internal citation and quotation marks omitted). The Ninth Circuit erred by construing § 1973-gg-4(a)(1) in isolation, rather than as part of a larger statutory scheme that permits States to require evidence of citizenship.

Indeed, the NVRA by its terms contemplates that some applicants who use the Federal Form will be rejected as it requires that applicants be notified of the "disposition of [his or her] application." 42 U.S.C. § 1973gg-6(a)(2). Hence, Arizona "accepts and uses" the Federal Form, even if it denies an application because it does not contain the requisite evidence of citizenship.

D. Proposition 200 Is Consistent with Congress's Purpose of Protecting Election Integrity.

In addition, Proposition 200's evidence-of-citizenship requirement is consistent with Congress's express purposes for enacting the NVRA. 42 U.S.C. § 1973gg(b). While the NVRA's goals indicate Congress's intent to increase voter registration, they also emphasize Congress's concern with the integrity of the election process, including ensuring that only eligible voters are registered. *Id.* (the four express purposes include Congress's intent that the NVRA enhance participation of *eligible* voters and protect the *integrity of the electoral process*). Because only U.S. citizens are eligible to vote, Proposition 200's evidence-of-citizenship requirement is consistent with the NVRA's

express goals.

Congress's concern that only *eligible* voters register is evidenced throughout the NVRA. For example, the NVRA requires administrators of federal elections to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). It also requires election administrators to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. *Id.* § 1973gg-6(a)(4); *see also Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 ("eligibility is the definitive criterion for registration and list maintenance obligations" and as a result, "States must strive to add eligible voters and to remove ineligible ones"). Because Proposition 200's evidence-of-citizenship requirement is consistent with the congressional goal of registering *eligible* voters, it does not stand as an obstacle to the accomplishment and execution of Congress's purposes in enacting the NVRA.

Indeed, the district court's factual findings on remand regarding Proposition 200's evidence-of-citizenship requirement further demonstrate that the requirement is not an obstacle to the accomplishment of Congress's purposes in enacting the NVRA. Justice Stevens noted two factual resolutions as key in resolving this case: (1) The scope of the disenfranchisement that the evidence requirements will produce, and (2) the prevalence and the character of the fraudulent practices that allegedly justify those requirements. *Purcell*, 549 U.S. at 6 (Stevens, J.

concurring).

Following a trial on the remaining claims, including Equal Protection, the district court granted judgment in favor of the State. (Pet. App. 8c-9c.) The district court found that the burdens on potential registrants were not excessive. (JA 291.) Plaintiffs were able to produce only "one person ... who [was] unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate[] that ... persons rejected are in fact eligible to register to vote." (*Id.* at 292) The district court also found that voter fraud was a significant problem. (*Id.* at 294.) The district court's factual findings demonstrate that Proposition 200 is not inconsistent with Congress's purposes in enacting the NVRA.

Instead of paying attention to the district court's findings that voter fraud is a significant problem in Arizona and that Proposition 200 did not significantly burden potential registrants, the court of appeals erroneously concluded that Proposition 200 is "seriously out of tune" with the NVRA. (Pet. App. 30c.) Arizona should be permitted to require evidence of citizenship because it is consistent with the NVRA's purpose of protecting the integrity of the electoral process. Otherwise, the only protection is the applicant's sworn statement that he or she is a citizen. But someone who is willing to commit voter fraud is likely to be willing to attest to false information. This honor system deprives the State of the ability to protect the integrity of its electoral process. *Cf. Purcell*, 549 U.S. at 4 (fraud in voting pollutes the democratic process by "driv[ing] honest citizens out ...

and breed[ing] distrust of our government").

E. The EAC's Failure to Include Arizona's Evidence-of-Citizenship Requirement in the Federal Form's State-Specific Instructions Has No Preemptive Force.

The Ninth Circuit also concluded that the EAC possesses the "ultimate authority" to determine the contents of the Federal Form. (Pet. App. 34c.) Accordingly, the Ninth Circuit effectively gave the EAC preemptive power by reasoning that "[o]nce the EAC determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants." (*Id.* at 36c.) In so doing, the Ninth Circuit drastically expanded the scope of the EAC's authority under the NVRA beyond what Congress ever prescribed or intended.

The EAC is a federal agency of extremely limited powers. Unlike other federal regulatory agencies,[10] Congress explicitly *denied* the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42

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[10] *See, e.g.*, 47 U.S.C. § 253(d) (authorizing the Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with the development of competitive telecommunications services) and 49 U.S.C. § 5125(d) (authorizing the Secretary of Transportation to determine whether particular state, local, or tribal requirements respecting the transportation of hazardous materials are preempted).

U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits only the development of the Federal Form, and "provid[ing] information to the States with respect to the responsibilities of the States under [the NVRA]." Congress did not give the EAC authority to preempt State law.

The Ninth Circuit relied heavily on the notion that the EAC exercised its "ultimate authority" by "rejecting" Arizona's request to include the evidence-of-citizenship requirement as a part of its other state-specific instructions already contained in the Federal Form. (Pet. App. 34c). But pursuant to the Help American Vote Act (HAVA), "[a]ny action" taken by the EAC in furtherance of its statutory authority "may be carried out only with the approval of at least three of its members." 42 U.S.C. § 15328. Notably, the EAC's purported "rejection" of Arizona's evidence-of-citizenship requirement has never been supported by a majority of its members. Rather, the Commission's only vote resulted in a deadlock, with two Commissioners voting in favor of including the requirement and two voting against it. (JA 225.)

The Ninth Circuit's reference to EAC's "rejection" of Arizona's requirement was really based upon an informal letter from the EAC's executive director relaying his opinion that the NVRA preempted state law because he believed that "[a]ny Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in *full satisfaction* of registration requirements." (JA 186) (emphasis added). As noted, this would require

registration even if there were irrefutable extrinsic evidence that the applicant is not a citizen. That cannot be the law.

In addition, this Court does not typically defer to "agency proclamations of preemption" but "perform[s] its own conflict determination" based upon "the substance of state and federal law." *Wyeth*, 555 U.S. at 576. This is especially true where, as here, there is no "agency proclamation" but merely an informal letter written by an agency staff member. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely conferred to "a single agency official." *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Rather, this Court has "rightly reject[ed]" the argument that a state law may be preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. at 2524 (Alito, J., concurring in part and dissenting in part). Accordingly, Mr. Wilkey's letter lacks "the force of law," *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), just as the Ninth Circuit's reliance on it as the "ultimate authority" governing preemption in this case lacks the force of logic.

III. The NVRA Should Be Read As Not Preempting Proposition 200 to Avoid Raising a Serious Doubt as to the NVRA's Constitutionality.

Under the canon of constitutional avoidance, "when deciding which of two plausible statutory

constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *see also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (internal citation and quotation marks omitted).

As explained below, interpreting the NRVA to preempt Proposition 200's requirement of evidence of citizenship would raise a "serious doubt" as to the constitutionality of the NRVA so applied, because the Constitution reserves to the States the exclusive power to determine the qualifications for voters in federal elections. That problem can be avoided, however, by interpreting the NRVA as not preempting Proposition 200's proof-of-citizenship requirement for applicants using the Federal Form. That construction is much more than "fairly possible," because Arizona can "accept and use" the Federal Form as required by § 1973gg-4(a)(1) and still require voter registration applicants to provide evidence of citizenship. As Chief Judge Kozinski recognized below, the statutory language is "readily susceptible" to this broader interpretation. (Pet. App. 89c.). Adopting this construction will avoid a possible collision between the NVRA and the Constitution.

A. If the NVRA Is Construed to Preempt

Proposition 200's Evidence-of-Citizenship Requirement, the Construction Raises Serious Question Concerning the Constitutionality of the NVRA Because Such a Construction Intrudes upon the States' Exclusive Power to Define and Enforce Voter Qualifications in Federal Elections.

1. The Voter Qualifications Clauses assign to the States the exclusive power to define and enforce voter qualifications in federal elections.

The Constitution expressly assigns to the States the exclusive power to define and enforce the qualifications to vote in federal elections. *See* U.S. Const. art. I, § 2., cl. 1 ("the Electors [for U.S. House elections] in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature"); U.S. Const., amendment XVII ("The electors [for U.S. Senate elections] in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature."); U.S. Const., art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in the Congress[.]").[11]

Under the foregoing provisions (collectively, the

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[11] A state legislature's power to "appoint" presidential electors must necessarily incorporate the authority to set qualifications of voters if popular election is chosen as the mode of appointment.

Voter Qualifications Clauses"), the qualifications for voting in federal elections are those "which may be established by the State itself" and are not subject to the "occasional regulation of the Congress." *The Federalist No. 52*, at 354 (James Madison) (J. Cooke ed. 1961). "[P]rescribing qualifications" for voters in federal elections "forms no part of the power . . . conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60*, at 408-09 (Alexander Hamilton) (emphasis in the original). Therefore, "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Gray v. Sanders*, 372 U.S. 368, 379 (1963); *see also Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45, 51 (1959); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 806 (1995) (noting Madison's contrast in the *Federalist No. 52* of "state control over the qualifications of electors with the lack of state control over the qualifications of the elected").

This Court explained that "Hamilton expressly distinguished the broad power to set qualifications *from the limited authority under the Elections Clause*." *U.S. Term Limits*, 514 U.S. at 833 (emphasis added). The Elections Clause's power to regulate the "manner" of elections has a limited "procedural focus" that "'only' allows the States—and Congress if it chooses to exercise that authority—'to determine *how* [voters] shall elect—whether by ballot, or by vote, or any other way.'" *Id.* (quoting 4 Elliot's Debates 71 (Steele statement at North Carolina ratifying convention) (emphasis in original)). The Elections Clause, then, is

a "grant of authority to issue procedural regulations, and not a source of power to . . . *evade important constitutional restraints*." *Id.* at 833-34 (emphasis added).

Just as the Elections Clause did not authorize Arkansas in *U.S. Term Limits*, 514 U.S. at 828-36, to evade the restraints of the Constitution by establishing *member* qualifications beyond those established in the Constitution, the same Elections Clause power does not authorize Congress here to evade the restraints of the Voter Qualifications Clauses, which reserve to the States the power to set *voter* qualifications in federal elections. *See ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (upholding Congress's power under the Elections Clause to enact the general voter registration provisions of the NVRA, but suggesting that if the State could show that the NVRA made "it impossible for the state to enforce its voter qualifications . . . we might have a different case") (Posner, J.). Here, if the NVRA precludes Arizona from requiring registrants to show satisfactory evidence of citizenship, the NVRA intrudes on Arizona's determination that only citizens are qualified to vote.

Finally, this Court's highly fractured decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), provides no support for the proposition that the Elections Clause authorizes Congress to prevent Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections. In *Mitchell*, the Court considered various States' challenges to Congress's power to, *inter alia*, set a minimum voting age of eighteen in all federal elections.

In three separate opinions, none of which commanded a majority, five Justices concluded (for different reasons) that Congress had the power to set a minimum voting age in federal elections. Three Justices reasoned that such authority resided in Congress's power to enforce the Fourteenth Amendment and did not discuss the Elections Clause. *See Mitchell*, 400 U.S. at 229-281 (joint opinion of Brennan, White, and Marshall, J.J.). Justice Douglas, writing separately, agreed that such authority resided in the Fourteenth Amendment, *id.* at 135-44 (opinion of Douglas, J.), but expressly rejected the contention that the Elections Clause gave Congress such power. *See id.* at 143 (acknowledging that the Elections Clause gives "Congress only the power to regulate the 'Manner of holding Elections,' not the power to fix qualifications for voting in Elections"). Justice Black, writing separately, concluded that the Elections Clause gave Congress the authority to regulate voting qualifications, *see id.* at 117, 118-124 (opinion of Black, J.), but expressly rejected the Fourteenth Amendment as a source of such authority, *see id.* at 125-31.

Four Justices dissented from the Court's judgment upholding Congress's power to set a minimum voting age in federal elections, reasoning in two separate opinions that neither the Elections Clause nor the Fourteenth Amendment so authorized Congress to establish voter qualifications in federal elections, as the Voter Qualifications Clauses assign this authority to the States exclusively. *See id.* at 118, 152-219 (opinion of Harlan, J.); *id.* at 293-96 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.).

In expressly rejecting the Elections Clause as a source of congressional authority to regulate voter qualifications in federal elections, the four dissenters, as noted above, were joined by Justice Douglas. And in expressly rejecting the Fourteenth Amendment as a source of such authority, the four dissenters, as noted above, were joined by Justice Black.

Hence, the significance of *Mitchell* for Elections Clause purposes is that a *majority* of five Justices expressly concluded that the Elections Clause does not authorize Congress to regulate qualifications for voting in federal elections, and only Justice Black found such authority. Three Justices (Brennan, White, and Marshall) also implicitly rejected the Elections Clause as a source for such authority by declining to join Justice Black's separate opinion.

In sum, as Alexander Hamilton recognized in the *Federalist* and this Court confirmed in *U.S. Term Limits*, the Elections Clause has a limited "procedural focus" that does not extend to setting qualifications of voters or members of Congress. This Court's decision in *Mitchell* is consistent with that conclusion, as five Justices expressly rejected the Elections Clause as a source of authority to regulate voter qualifications in federal elections.[12] As such, there is a persuasive

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[12] In Arizona's application to Justice Kennedy for a stay of mandate, Petitioners stated that "[t]here is, of course, no dispute that the Elections Clause permits Congress to alter state laws respecting federal elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Black, J., announcing the judgment of the Court) (age of voters in federal elections)." As discussed above, *Mitchell*'s judgment only applies to Congress's power to set a voting age and (Continued)

argument that the Elections Clause does not authorize the NVRA to preclude Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections. Therefore, to avoid the constitutional question of whether the Elections Clause authorized Congress to enact the NVRA's provision that precludes Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections, this Court should adopt Arizona's interpretation of term "accept and use" the Federal Form in the NVRA.[13]

B. The Fourteenth Amendment Does Not Authorize Congress to Prohibit Proposition 200's Non-Discriminatory Requirement of Evidence of Citizenship.

(Continued).

the highly fractured rationale of that decision does not support the Elections Clause as a source of authority to for Congress to preclude Arizona from enforcing its voter qualification of citizenship by requiring applicants to verify claims of citizenship. To the extent that Petitioner's stay application overstated *Mitchell*, Petitioners withdraw it.

[13] Similarly, this Court need not address whether the NVRA's general voter registration provisions exceed Congress's authority under the Elections Clause. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (stating in dicta that the Elections Clause "embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved"). In any event, *Smiley* did not go so far as to include voter *qualifications* among the subjects within the Clause's scope.

In the absence of the Elections Clause as a source of constitutional authority for the NVRA to prevent Arizona from requiring evidence of citizenship as a qualification for voting, the only other possible source of such authority is Congress's power under Section Five of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. As discussed above, a majority of the Court in *Mitchell* expressly rejected this authority as a source of power to set a minimum national age in federal elections.

Moreover, the rationale of the four Justices in *Mitchell* who found that the Fourteenth Amendment authorized Congress to set a minimum voting age in federal elections does not support the conclusion that such a power extends to prohibiting Arizona from requiring evidence of citizenship in federal elections. In *Mitchell*, Justices Douglas, Brennan, White, and Marshall all concluded that Congress could reasonably determine that persons in the eighteen-to-twenty-one-age group were mature enough to vote, and that Congress was within its authority to act to protect their fundamental right to vote. *See* 400 U.S. at 142-44 (opinion of Douglas, J.); 400 U.S. at 240 (joint opinion of Brennan, White, and Marshall, J.J.). Arizona has a vital state interest in protecting the integrity of its elections by requiring voter registrants to provide evidence of citizenship, and Congress made no findings that requiring such evidence has any discriminatory effect. Arizona does not violate the Equal Protection Clause by denying non-citizens the right to vote in federal elections. The district court

specifically found that there was no Fourteenth Amendment violation here.

In any event, this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) forecloses the Fourteenth Amendment as a source of authority for the NVRA to preempt Proposition 200's evidence-of-citizenship requirement. In *Flores*, this Court explained that Congress's power under the Fourteenth Amendment "extends only to enforcing the provisions" of that Amendment, a power which is "remedial." *Id.* at 519. This power does not include the power to determine "what constitutes a constitutional violation." *Id.* There must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Denying non-citizens the right to vote inflicts no cognizable constitutional injury. Citizenship is a legitimate voter qualification, and requiring evidence of citizenship is a reasonable means of enforcing that qualification. If the NVRA preempts Proposition 200's evidence-of-citizenship requirement, "it is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Flores*, 521 U.S. at 532. Instead, so construed, the NRVA attempts "a substantive change in constitutional protections" by denying Arizona the ability to enforce its legitimate voter qualification of citizenship. *Id.* As such, the NVRA exceeds Congress's enforcement power under the Fourteenth Amendment to the extent that it is read to preempt Proposition 200.

In sum, this Court should find that the NVRA does

not preempt Proposition 200's evidence-of-citizenship requirement to avoid the serious constitutional question of whether, as so applied, it intrudes upon the States' power to under the Voter Qualifications Clauses to define and enforce voter qualifications in federal elections.

CONCLUSION

For the forgoing reasons, the State requests that the Court reverse the Ninth Circuit's decision and remand for proceedings consistent with its Opinion.

Respectfully submitted,

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PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 12-71

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In The
Supreme Court of the United States

STATE OF ARIZONA, *et al.*,
Petitioner,

v.

INTER TRIBAL COUNCIL OF ARIZONA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE TWENTY-SIX COUNTY RECORDERS AND COUNTY ELECTION DIRECTORS PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err 1) in creating a new heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requires persons who are registering to vote to show evidence of citizenship?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Arizona's County Recorders and County Elections Directors for thirteen of the fifteen Counties in Arizona, sued in their official capacities, are as follows: Helen Purcell, Maricopa County Recorder; Karen Osborne, Maricopa County Election Director; Lenora Fulton, Apache County Recorder; Angela Romero, Apache County Election Director, who has replaced Penny Pew; Christine Rhodes, Cochise County Recorder; Juanita Murray, Cochise County Election Director, who has replaced Thomas Schelling; Sadie Jo Tomerlin, Gila County Recorder, who has replaced Linda Haught Ortega; Linda Eastlick, Gila County Election Director, who has replaced Dixie Mundy; Wendy John, Graham County Recorder; Judy Dickerson, Graham County Election Director; Berta Manuz, Greenlee County Recorder; Yvonne Pearson, Greenlee County Election Director; Shelly Baker, La Paz County Recorder; Donna Hale, La Paz County Election Director; Carol Meier, Mohave County Recorder, who has replaced Joan McCall; Allen Tempert, Mohave County Elections Director; F. Ann Rodriguez, Pima County Recorder; Brad Nelson, Pima County Election Director; Laura Dean-Lytle, Pinal County Recorder; Steve Kizer, Pinal County Election Director, who has replaced Gilberto Hoyos; Suzanne "Suzie" Sainz, Santa Cruz County Recorder; Melinda Meek, Santa Cruz County Election Director; Leslie Hoffman, Yavapai County Recorder, who has replaced Ana Wayman -Trujillo; Lynn Constable, Yavapai County Election Director; Robyn S. Pouquette, Yuma County Recorder, who has replaced Susan Hightower Marler; and Sue

Reynolds, Yuma County Elections Director, who has replaced Patti Madrill. The twenty-six County Recorders and County Election Directors were Appellees Case No. 08-17094 before the United States Court of Appeals for the Ninth Circuit.

The other Appellees in the Ninth Circuit were Ken Bennett, in his official capacity as Arizona Secretary of State, Candace Owens, in her official capacity as Coconino County Recorder, Patty Hansen, in her official capacity as Coconino County Elections Director, Laurette Justman, in her official capacity as Navajo County Recorder, and Johnathan R. Roes, in his official capacity as Navajo County Elections Director, who has replaced Kelly Dastrup.

The Respondents are Plaintiffs Jesus M. Gonzalez, Bernie Abeytia, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., Project Vote and Arizona Hispanic Community Forum, hereinafter referred to as the "Gonzalez Plaintiffs." The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens; Arizona League of Women Voters of Arizona; and Hopi Tribe, hereinafter referred to as the "ITCA Plaintiffs." Both in the Trial Court and on Appeal the case brought by the Gonzalez Plaintiffs was consolidated with the case brought by the ITCA Plaintiffs.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated April 17, 2012, is reported at 677 F.3d 383 (9th Cir. 2012)(en banc) (*Gonzalez III*).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is dated April 17, 2012. This Court granted the petition for writ of certiorari submitted by the State of Arizona, and twenty-six of Arizona's County Recorders and Elections Directors on October 15, 2012. *Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, 2012 WL 2921874. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional and statutory provisions are as follows:

U.S. Constitution

Section 4, Clause 1. Congressional Elections; Time, Place, and Manner of Holding

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

National Voter Registration Act

42 U.S.C. § 1973gg. Findings and purposes

(a) Findings

The Congress finds that--

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on

voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are--

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg-4. Mail registration

(a) Form
(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of

the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms
The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters
(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C.A. § 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices
If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title.

42 U.S.C. § 1973gg-7. Federal coordination and regulations

(a) In general
The Election Assistance Commission--

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures,

forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form
The mail voter registration form developed under subsection (a)(2) of this section--

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that--

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Help America Vote Act

42 U.S.C. § 15483. Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter

registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that--

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of this title (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a) of this section.

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank

statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 15482(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 15482(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq.);

(ii) provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form."

(iv) A statement informing the individual that if the form is submitted by mail and the individual is

registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002 to comply with such a provision after such date.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) of this section shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized Statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) of this section on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) of this section on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) of this section shall apply to any individual who registers to vote on or after January 1, 2003.

Arizona Revised Statutes

§ 16-166. Verification of registration

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears in the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by § 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the elector's registration status shall be changed from active to inactive.

B. If the elector provides the county recorder with a new registration form, the county recorder shall change the general register to reflect the changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form to the county recorder of the

county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify registrants whose addresses may have changed. If it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration

information. If the registrant fails to return the form postmarked not later than thirty-five days after the mailing of the notice, the elector's registration status shall be changed from active to inactive. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

G. Notwithstanding subsection F of this section, any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship unless the person is changing voter registration from one county to another.

H. For the purposes of this section, proof of voter registration from another state or county is not satisfactory evidence of citizenship.

I. A person who modifies voter registration records with a new residence ballot shall not be required to submit evidence of citizenship. After citizenship has been demonstrated to the county recorder, the person is not required to resubmit satisfactory evidence of citizenship in that county.

J. After a person has submitted satisfactory evidence of citizenship, the county recorder shall indicate this information in the person's permanent voter file. After two years the county recorder may destroy all documents that were submitted as evidence of citizenship.

STATEMENT OF THE CASE

This case concerns Arizona's voter registration statute that requires individuals seeking to register to vote provide satisfactory evidence of citizenship. Twenty-six of Arizona's County Recorders and County Elections Directors seek this Court's reversal of the Ninth Circuit's decision, which held that Arizona's proof of citizenship requirement conflicts with the requirements of the federal voter registration form provided for in the National Voter Registration Act (the "NVRA"). *Gonzalez v. State*, 677 F.3d 383 (9th Cir. 2012)(en banc) (*Gonzalez III*).

In 2004, Arizona voters passed a state initiative, Proposition 200, which amended Arizona Revised Statutes (A.R.S.) § 16-166 by requiring

County Recorders to "reject any application for registration that is not accompanied by satisfactory evidence of U.S. Citizenship." Joint Appendix ("J.A.") 171-176. Shortly after Proposition 200's implementation, a number of plaintiffs filed lawsuits against the Secretary of State, the fifteen County Recorders and fifteen County Election Directors on the following grounds: (1) that it was an unconstitutional poll tax; (2) that it violated the Equal Protection Clause of the Fourteenth Amendment; (3) that it violated the Fourteenth Amendment's guarantee of the fundamental right to vote; (4) that it violated Section 2 of the Voting Rights Act; (5) that it violated two provisions in the Civil Rights Act; and (6) that it violated the NVRA. J.A. 1, Record 1 and 4, Record 20. The separate cases brought by the Gonzalez Plaintiffs and ITCA Plaintiffs were consolidated by the trial court.

After the district court denied their preliminary injunction motion (J.A. 1, Record 19, Record 183), the Gonzalez Plaintiffs and ITCA Plaintiffs appealed, and a motions panel of the Ninth Circuit Court of Appeals granted their emergency motion for injunction pending appeal. J.A. 1, Record 189. The Supreme Court subsequently vacated the motions panel's injunction. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Appellants limited their appeal to the Ninth Circuit to the district court's denial of a preliminary injunction with respect to Proposition 200's proof of citizenship requirement. *Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9th Cir. 2007)(*Gonzalez I*). After briefing and argument, the *Gonzalez I* panel affirmed the district court's denial of the preliminary injunction ruling as a matter of

law that Proposition 200's proof-of-citizenship registration requirement was not in conflict with the federal form prescribed by the NVRA. *Id.* at 1050-51.

After *Gonzalez I* was issued, the case returned to the district court, and the district court granted the motions for summary judgment filed by the State and Counties on the NVRA issue. *Gonzalez v. Arizona*, No. CV 06-1268 (D. Ariz. Aug. 28, 2007)(order granting summary judgment); J.A. 199. The district court held that the Arizona law requiring evidence of citizenship for voter registration does not conflict with a plain language reading of the NVRA. *Id.*

In the ensuing appeal, the Gonzalez Plaintiffs and ITCA Plaintiffs again challenged, among other issues, the *Gonzalez I* determination that Arizona's proof of citizenship registration requirement does not violate the NVRA.

On October 26, 2010, in a 2-1 decision, the panel held that the NVRA preempted Proposition 200's proof-of-citizenship requirement. *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) *(Gonzalez II)*. The majority panel also held that it was not bound to follow the previous panel's decision to the contrary by either the doctrine of law of the case or the doctrine of law of the circuit. *Id.* at 1190-91. Given the conflicting rulings by two separate three-judge panels, a majority of the active judges of the court voted to rehear the case en banc. *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2011).

Upon rehearing, the Ninth Circuit held that Proposition 200's registration provision is preempted by the NVRA under the Election Clause, U.S. Const. Art. 1, § 4, cl 1, because the NVRA and Proposition 200 registration provision do not operate harmoniously as a single procedural scheme for the registration of voters for federal election. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) *(Gonzalez III)*. Upon a joint petition for a writ of certiorari filed by the State of Arizona and twenty six of the County Recorders and Elections Directors, this Court granted certiorari. *Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, Oct. 15, 2012. 2012 WL 2921874.

SUMMARY OF ARGUMENT

Arizona's County Recorders and Elections Directors have a duty to ensure that elections are administered to provide the greatest opportunity for those who are eligible to participate; that the standards governing voter registration be settled. clear and easily administered; and that the officials responsible for conducting elections have the means to safeguard against schemes to influence the outcome of elections by fraud or corruption.

The NVRA does not expressly or implicitly forbid Arizona from requiring additional identifying information to verify a voter's eligibility. Requiring that every new registrant provide proof of citizenship complements the NVRA by satisfying the purpose of the Act. 42 U.S.C. § 1973gg(b). Indeed, Congress stated the Act's purposes were "to protect the integrity of the electoral process; and to ensure that

accurate and current voter registration rolls are maintained." *Id.*

The proof of citizenship requirement for all new voter registrations provides a significant additional benefit because it simplifies election administration. A uniform voter registration process will result in more consistent treatment of each voter and will make it easier for County election officials to verify a first time voter's identity and eligibility to vote.

This Court has repeatedly recognized that States have a compelling interest in assuring the integrity of elections, and must be granted the flexibility to combat potential fraud and corruption in the electoral process. While States are fully justified in responding to *the potential* for electoral fraud, history confirms that fraud in the voter registration process, and in the conduct of balloting, does indeed occur. Protecting against the threat of real and potential vote fraud must be balanced against the desire to provide every eligible citizen access to the ballot box.

Election officials strive to decrease public disenchantment and cynicism concerning the process by which our elections are conducted. Such public skepticism is troubling, and will lead to even further reductions in voter turnout. As this Court has recognized, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4

(2006) (per curiam). It should be easy to vote, but tough to cheat.

ARGUMENT

Congress enacted the National Voter Registration Act in 1993 ("NVRA"). It prescribes at least three methods for registering voters for federal elections. 42 U.S.C. § 1973gg-2(a). These methods are: (1) "by application made simultaneously with an application for a motor vehicle driver's license," *id.* § 1973gg-2(a)(1); (2) "by mail application," *id.* §§ 1973gg-2(a)(2), 1973gg-4; and (3) "by application in person," *id.* § 1973gg-2(a)(3). States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law." *Id.* § 1973gg-2(a); *Young v. Fordice*, 520 U.S. 273, 275 (1997).

The NVRA directs the Election Assistance Commission ("EAC") to develop a federal form for use in registering voters by mail and "in consultation with the chief election officers of the States." 42 U.S.C. § 1973gg-7(a)(2); 42 U.S.C. §§ 15321 *et seq.* The federal form must "enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). One of the express eligibility criteria that must be included on the form is a question about United States citizenship. *Id.* § 1973gg-7(b)(2)(A).

The NVRA's four purposes are:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b)(emphasis added).

One of Congress's goals in adopting the NVRA was to provide clear guidelines "for Federal, State, and local governments to implement [voter registration] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b)(2). But the Ninth Circuit's disposition of this case—first finding Proposition 200 not preempted, then finding it to be preempted years later—has only caused confusion among voter registration organizations, election officials, and voters. The Ninth Circuit's *en banc* decision to prohibit enforcement of a law enacted by initiative nullifies the policy choice made by the voters of Arizona. Arizona is a sovereign State, its people directly enacted Proposition 200, and the

Ninth Circuit's decision unjustifiably increases the federal government's involvement in state and local elections.

I Election officials have a duty to maintain accurate voter registration rolls while registering eligible voters for Federal, State, and local elections.

The Ninth Circuit mentions that the NVRA has "four articulated purposes," *Gonzalez III*, 677 F.3d at 403, but saw only one as controlling: "Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process." *Id.* at 400. But the NVRA is a balance of multiple interests with more than one purpose. "*None* of these purposes is served when individuals who are not citizens register to vote. *See John v. United States*, 247 F.3d 1032, 1036-37 (9th Cir. 2001) ("We must not 'interpret federal statutes to negate their own stated purposes.' ")." *Gonzalez v. Arizona*, 624 F.3d 1162, 1210 (Kozinski, J., dissenting). "The majority never explains why a statute enacted to 'protect the integrity of the electoral process' and 'ensure' that voter rolls are 'accurate' must preclude states from confirming that those who wish to register are, in fact, eligible to vote." *Id.*

The Ninth Circuit's narrow reading of the NVRA is inconsistent with the statutory language and was rejected by this Court in *Crawford v. Marion County Election Board*, 553 U.S. 181(2008). In upholding Indiana's photo identification requirement, the Court examined the two recently

enacted statutes, the NVRA and the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15483, which both contain provisions consistent with a State's choice to verify a citizens eligibility to vote. "In the ... NVRA ...Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process." *Crawford*, 553 U.S. at 192.[1] HAVA requires the States to verify voter information contained in a voter registration application and specifies either an "applicant's driver's license number" or "the last 4 digits of the applicant's social security number" as acceptable verifications. *Id.*; 42 U.S.C. § 15483(a)(5)(A)(i). HAVA and the NVRA contain provisions that are consistent with permitting election officials to verify the eligibility of voters.

Congress was apparently interested in "protect[ing] the integrity of the electoral process," 42 U.S.C. § 1973gg(b)(3), by reducing state-imposed obstacles to federal registration. Such obstacles include any requirement by a State for notarization or formal authentication of the federal voter registration form. 42 U.S.C. § 1973gg-7(b)(3). Requiring evidence of citizenship, which is as simple

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[1] *See Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009) ("Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained."); *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 391 (6th Cir. 2008) (NVRA has "dual objectives" of "increas[ing] the number of eligible citizens who register to vote in elections for federal office, while also assuring that '*accurate and current* voter registration rolls are maintained." Emphasis in original.).

as providing a driver's license number,[2] was not included in the list of what may not be included on the federal form. Instead, proving one's eligibility to register to vote at the time of registration ensures that only eligible voters cast their ballots on election day. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford*, 553 U.S. at 196. The *Crawford* analysis of the state's interests was not confined to the polling places, but encompasses the entire "election process." *Id.* By focusing solely on a single purpose of the NVRA, the Ninth Circuit's decision conflicts with *Crawford*.

The Ninth Circuit's limited view of the intent of the NVRA is not supported by the text of the statute. The NVRA expressly authorizes states to require "such identifying information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). This provision permits the type of "identifying information" that Arizona requires and is "necessary to enable" election officials to assess the eligibility of voters. "Had Congress meant to enact a comprehensive code of voter registration, it could have said so in the NVRA, but it didn't." *Gonzalez II*, 624 F.3d at 1208 (Kozinski, J., dissenting). Instead, local government officials must maintain current and accurate voter

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[2] A.R.S. § 16-166(F)(1).

registration lists through a comprehensive voter registration system.

Despite Congress having granted the States authority to assess eligibility, the Ninth Circuit's ruling actually restricts the State's authority by effectively limiting the verification of eligibility to only the signature of the registrant. This statutory interpretation ignores the NVRA's specific authority to States to determine what information other than the signature might be requested. 42 U.S.C. § 1973gg-7(b)(1).

The NVRA imposes certain mandates on States and describes those mandates in detail, but implementation of NVRA is not purely ministerial. In *Young v. Fordice*, 520 U.S. 273, 286 (1997), the Court reviewed Mississippi's plan for separate state and federal voter registration systems in its attempt to comply with requirements of the NVRA for federal registration. The *Fordice* Court found that the proposed federal voter registration process included practices and procedures that were significantly different from state's old system. "The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may – or may not – provide or request." *Id.*

These policy choices were recognized by original Ninth Circuit panel, which determined that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez I*, 485 F.3d at 1050-51. Restricting the States' verification of eligibility to just the signature of the

registrant conflicts with the decision of the Sixth Circuit in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000). In *McKay*, the court upheld the state requirement that voter registration applicants provide valid social security numbers to register. "The NVRA does not specifically forbid use of social security numbers." *Id.* at 755. Thus, Ninth Circuit's reading of the language and structure of the NVRA conflicts with that in *Fordice* and *McKay*.

In addition, the NVRA gives the states the authority to come up with their own NVRA-compliant forms rather than the federal form. *See* 42 U.S.C. § 1973gg-4(a)(2). "[T]he NVRA itself expressly, not merely implicitly, authorizes a state to 'develop and use' its own form 'for the registration of voters in elections for Federal office,' in addition to accepting and using the [federal form].'" *Gonzalez III*, 677 F.3d at 445 (Rawlinson, J., dissenting). "[T]he plain text creates a minimum standard through the federal form and allows a state to require more as long as it is within the bounds of § 1973gg-7(b)." *Id.* States retain the task of determining that an applicant is eligible to register to vote and that the submitted registration form complies with state law.

II. Voter registration standards should be settled, clear and easily administered.

Because Arizona cannot apply its eligibility requirements to federal elections, Arizona's Secretary of State and the County Recorders could have created separate federal-state registration regimes to enforce both state and federal law. "[A]n

Arizona applicant meeting the Federal Form requirements, but lacking satisfactory evidence of citizenship, would have to be allowed to vote for federal officials but could not vote for state officials." *Gonzalez III*, 677 F.3d at 449 (Rawlinson, J., dissenting). This system would have required Arizona to "track whether . . . residents are registered to vote for federal elections, state elections, or both" and to distinguish between these classes of voters on Election Day. *Id.* But the State and Counties did not want to create any more confusion for the voters by having a separate federal and State registration system.

Instead, just weeks before the 2012 General Election, Arizona's Secretary of State, County Recorders, and County Elections Directors scrambled to develop a dual voter registration process: one for the State form and one for the federal form. App.1.[3] For the State form, the new process directs the County Recorders to continue processing the registrations by requiring satisfactory evidence of citizenship. In addition, the County Recorders shall continue rejecting State forms that do not evidence proof of citizenship.

For the federal form, the new process directs the County Recorders to continue accepting the federal forms, but not to reject any federal form that does not provide satisfactory evidence of citizenship. To comply with HAVA, all first time registrants must prove his or her identity by providing an

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[3] The Appendix attached to this Brief is referred to as App.1; http://www.azsos.gov/election/Electronic_Voting_System/VR_Addendum.pdf.

Arizona driver's license number or some other form of acceptable identification before being allowed to vote. 42 U.S.C. § 15483(a)(5)(A); App. 1. As a result, all first time registrants that use a federal form must show identification at the time of registering or at the polling place on election day. App. 1. If the registrant's identity cannot be verified from the information given on the federal form, the registration is placed on suspense pending verification of the registrant's identity.

Arizona's voter registration system is now splintered. The Ninth Circuit's decision forced the creation of a system that elevates form over substance.

III. The NVRA and Arizona's voter registration process requiring proof of citizenship do not conflict.

The text of the NVRA does not directly address the precise question at issue, namely whether states can ask for supplemental proof of citizenship. The statute says that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [Election Assistance Commission]." 42 U.S.C. § 1973gg-4(a)(1). It likewise requires "[a]cceptance of completed voter registration application forms" at state and local government offices, which must be transmitted "to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4)(iii). The statute doesn't obviously prohibit supplemental state requirements. By requiring states to "accept and use" the federal form "for the registration of voters in

elections for Federal office,"[4] 42 U.S.C. § 1973gg-4(a)(1), Congress could not have meant to preclude states from imposing additional requirements. Neither "accept" nor "use" has such a preclusive meaning. *Gonzalez II*, 624 F.3d at 1206 (Kozinski, J., dissenting).

"There's no question that Arizona accepts and uses the federal form for the information contained in it. Arizona only asks for proof of citizenship *in addition* to the form in order to complete the registration process." *Id.* The *only* thing the NVRA expressly prohibits states from requiring is "notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). That specific prohibition in the NVRA is a strong indication that other prohibitions were not intended. *Gonzalez II*, 624 F.3d at 1206 (Kozinski, J., dissenting) (citing *United States v. Cabaccang*, 332 F.3d 622, 630 (9th Cir.2003); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n. 9 (1995)).

By looking at only one of the purposes of the NVRA, the Ninth Circuit's analysis creates the false impression that the NVRA is inconsistent with Arizona's law. To the contrary, Arizona's law is consistent with NVRA's purpose to protect the integrity of the electoral process." *Crawford v. Marion County Election Board*, 553 U.S. 181, 192 (2008). "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election

process." *Crawford*, 553 U.S. at 196. The State and County election officials' interest in the orderly and accurate administration of the election process starts with registering only those eligible to vote.

Protecting the integrity of the electoral process is necessary to the achievement of the other NVRA purposes. For example, Congress recognized that the integrity of the electoral process was crucial to "enhanc[ing] the participation of eligible citizens as voters." § 1973gg(b)(2). This Court has maintained that states must structure the electoral process "to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)(quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Arizona's record shows that non-citizens have registered, or attempted to register to vote. Between 1996 and 2006, "as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens." *Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9th Cir. 2007) (*Gonzalez I*). Arizona's voter registration requirements are justified because of the compelling interest in preventing election fraud, ensuring only eligible voters are registered to vote, and maintaining public confidence in the electoral system.

A. Voter confidence is a fundamental component of ensuring democratic participation.

The right of citizens to select their representatives is one of the bedrocks of our democracy. "No right is more precious in a free

country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Supreme Court has long recognized the importance of an electorate confident in the integrity of its election systems. "Preserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance. . . Preservation of the individual citizen's confidence in government is equally important." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (citations omitted).

Likewise, in *Federal Elections Comm'n v. National Right to Work Committee*, the Supreme Court recognized the dual governmental interests in "preventing both actual corruption and the appearance of corruption," 459 U.S. 197, 210 (1982). Voter fraud – whether real or perceived, widespread or isolated – has a debilitating effect on lawful participation. Recognizing that voter fraud cancels out legitimate votes, the Court remarked that "the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533 (1964). Even the appearance of corruption erodes public confidence and deters legitimate voters from voting.

Arizona's proof of citizenship for voter registration is essential to ensure that only eligible voters vote. States inevitably must adopt regulations to secure the ballot and ensure that ballots are cast only by legitimate voters. Proof of citizenship is a non-discriminatory means to accomplish election security leading to enhanced public confidence in ballot integrity.

B. States Must Take Preventative And Preemptive Measures To Secure Elections Against Voter Fraud.

Even the threat or perception of election fraud can damage the integrity of an election. In 1982 the Supreme Court held it would not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197, 210 (1982)(preventing campaign finance corruption). Lawmakers must make take the necessary action to prevent corruption in the election process. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196.

Arizona's County Recorders and Elections Directors must protect the interests of the electorate up front rather than attempting to remedy the harm once fraud has occurred. In *Reynolds v. Sims*, this Court equated vote dilution with voter disenfranchisement. 377 U.S. 533, 555 (1964). This theme has continued other election cases.

> Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, . . . or diluted by stuffing of the ballot box, . . . No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (internal citations omitted); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The importance of preventing voters' legal ballots from being diluted by ballots cast by ineligible voters cannot be emphasized enough. Voter secrecy laws make it nearly impossible to find and retract an illegal ballot once it has been cast. Because of the compelling importance of preventing vote dilution and the near impossibility of reversing its effects, Arizona is justified in requiring a pre – registration security measure like proof of citizenship to prevent illegal votes from being cast in the first place.

CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX

ADDENDUM RELATING TO VOTER REGISTRATION

Proof of Citizenship Requirement-State Voter Registration Form

Arizona voters approved Proposition 200 at the November 2, 2004 general election. The Proposition requires that voters prove United States citizenship prior to registering to vote. The County Recorder must reject any registration that is not accompanied by satisfactory evidence of United States citizenship.

SPECIAL NOTE

NOTE REGARDING GONZALEZ V. ARIZONA

Notwithstanding Proposition 200, until otherwise directed the County Recorder shall not reject an application that is made via the form developed by the United States Election Assistance Commission for use in registration in federal elections (Federal Form) solely because it is not accompanied by satisfactory evidence of United States Citizenship. *See* Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012); see also Order of the District Court.

Satisfactory evidence of citizenship is specified in ARS § 16-166(F) and includes the applicant's driver license number or non-operating identification license number issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the

United States, if the agency indicates on the applicant's license that the person has provided satisfactory proof of United States citizenship.

[Ariz. Atty. Gen. Op. No. I05-001]

The other "satisfactory evidence" of citizenship includes:

- a copy of a birth certificate. Supporting legal documentation shall be provided if the name on the birth certificate is not the same as registrant's current name (i.e. marriage certificate, court documented name change).

- the counties shall also accept a United States birth certificate as proof of citizenship where the name on the birth certificate is different from the voter registration if the following five fields match on both the voter registration form and the birth certificate:
    1) First Name,
    2) Middle Name,
    3) Place of Birth,
    4) Date of Birth, and
    5) Parents' Name.

- in the event a United States citizen is born abroad in a non-military installation, they should have registered with the Department of State and obtained a "Certificate of Birth Abroad." This document counts as a birth certificate.
- pertinent pages of a United States passport identifying the registrant

- United States naturalization documents or the number of the certificate of naturalization (Alien Registration Number).
- a driver license or non-operating license from another state within the United States if the license indicates that the applicant has provided satisfactory proof of citizenship
- the registrant's Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, Tribal Enrollment Number, or Census Number
- Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth

In addition to presenting the evidence of citizenship documentation, a person registering to vote must sign a statement declaring that he or she is a United States citizen and acknowledging that executing a false registration is a class 6 felony. It is a state and federal crime to falsely claim to be a United States citizen when registering to vote.

[ARS §§ 16-152(A)(14); 16-152(A)(18); 16-166; 18 U.S.C. § 1015(f)]

Qualifications of Voters in City or Town Elections

No person is entitled to vote at an election in a city or town who has not been a qualified elector as defined in ARS § 16-121 in the city or town for **29 days before** the election.

A person who has resided for at least **29 days before** an election in an area annexed at least 29 days before an election by a city or town shall be entitled to vote at the city or town election, provided

the person is a qualified elector as defined in ARS § 16-121.

Charter cities may have different qualifications.

[Ariz. Const. Art. XIII, § 2; ARS § 9-822]

Voter Registration Processing-State Form

1) A new completed voter registration form comes in to the Recorder.

2) The voter registration form must be accompanied by proof of citizenship pursuant to ARS § 16-166(F). If the form is not accompanied by proper proof of citizenship, the voter registration form is not valid and either will not be entered into the system or if it was entered into the system, the record shall be canceled. If the registrant subsequently provides proof of citizenship, it must be accompanied by a new voter registration form and a new registration date.

3) If proof of citizenship has been provided and the form contains the five elements required by law—name, residence address, date of birth, signature and citizenship—it is entered and sent to the Secretary of State even if it does not contain the driver license number, nonoperating identification license number or the last four digits of the social security number.

4) If the voter registration form does not have one or more of the five elements, the information is put in a pending file until the data is acquired. The

registration cannot be considered received until the five elements are completed. The County Recorder will attempt to contact the registrant by phone or mail to obtain the missing information or a completed voter registration form. Any letter mailed shall include information informing the voter of approaching voter registration deadlines.

5) The Secretary of State will coordinate with the Arizona Motor Vehicle Division to check the voter file against the driver license number or nonoperating identification license number and the last four digits of the social security number.

6) The Secretary of State will add to the official registration file the driver license number or nonoperating identification license number, and the last four digits of the social security number, if there is sufficient matching information.

7) For any new voter registration that does not contain the driver license number or nonoperating identification license number or the last four digits of the social security number, the Secretary of State will match available data with the Arizona Motor Vehicle Division. If there is a match, data from MVD will be added to the record.

8) The Secretary of State will assign a unique identifying number to any registrant who does not have a driver license number, nonoperating identification license number or social security number.

9) Any registrant modifying their registration record in the county they are currently registered in does not need to provide proof of citizenship. If the registrant is registered in Arizona and now is registering in a new county, the registrant is required to provide proof of citizenship pursuant to ARS § 16-166(G).

10) The Secretary of State will return the file to the Recorder with a unique identifying number assigned to each registrant. Additionally, counties may maintain their own voter identification numbers. The counties will determine what number to use as the voter registration identification number that is printed on the citizen's voter registration card.

11) The Secretary of State will also send the Recorder an exception report. The Recorder will review the report for items such as duplicate voter registrations, felons, death records, and processing errors such as transposed numbers. If the driver license or social security records conflict with the registrant's information that was provided by the County Recorder, the registrant's information shall be changed to reflect the correct information. The County Recorder shall notify the registrant by letter to confirm which information is correct.

12) If there are any discrepancies between the Motor Vehicle Division record or County Recorder record in the name, driver license number, nonoperating identification license number or the last four digits of the social security number, the

Recorder shall send a letter to the registrant to confirm which information is correct.

a. If a registrant submits a voter registration application in which the Arizona driver license number does not match the records at the Motor Vehicle Division (MVD) and the driver license number is being used for proof of citizenship purposes, the county shall cancel the voter registration and send a letter to the registrant providing the registrant the opportunity to remedy the error. (See SAMPLE FORMS: Uniform Correspondence: AZ DLN Did Not Match at MVD.) The registration effective date will be the date the new voter registration form is signed, not the date of the form that had the incorrect driver license number.
b. If a registrant submits a voter registration application where the name, last four digits of social security number and/or the date of birth does not match the Motor Vehicle Division or the Social Security Administration, the Recorder shall send a letter to the registrant to confirm which information is correct. (See SAMPLE FORMS: Uniform Correspondence: MVD Non Match.) The registration effective date will be the date the original voter registration form was signed.

13) If the registrant does not provide the driver license number, nonoperating identification license number or the last four digits of his/her social security number, by signing the form, the voter is indicating that he/she does not have a

driver license number, nonoperating identification license number or social security number.

14) The voter registration form, accompanied by acceptable proof of citizenship must be accepted for processing even if the citizenship question is not answered. The registration shall not be completed, however, until the citizenship question is answered "yes" as required by ARS § 16-121.01 and 42 U.S.C. § 15483(b)(4)(B). The County Recorder shall notify registrants by letter in accordance with A.R.S § 16-134(B) and provide the registrant an opportunity to make a check mark or other appropriate indicator showing that the registrant answered "yes" to the question regarding citizenship. [*Id.*] For the purpose of voter registration, an appropriate indicator includes making a check mark in the box, placing an X in the box, circling the box, shading or any other method involving the "yes" box that indicates the registrant is a citizen.

15) All citizenship verification information collected pursuant to ARS § 16-166(F) shall be maintained by the County Recorder in a manner that the County Recorder reasonably believes will ensure that no unauthorized person has access to the information.

The Recorder shall maintain copies of citizenship proof provided by the voter batched by month and year. [ARS § 16-166(J)]. After two years, the County Recorder may destroy all documents that were submitted as evidence of citizenship. If the

County Recorder chooses to destroy these documents, the County Recorder must use due diligence to properly discard or dispose of the records.

16) If only the alien registration number from the naturalization documents is provided for citizenship purposes, the number shall be verified with the United States Citizenship and Immigration Services before the registrant may be added to the registration rolls.

To conduct the verification, each County Recorder shall establish an account with the United States Citizenship and Immigration Services to utilize the Systematic Alien Verification for Entitlements (SAVE) program. This program allows the Recorders access to information contained in the Verification Information System (VIS) database.

The alien registration number is the only number from a registrant's naturalization documents that can be validated against the SAVE system. The validation will indicate if the registrant is a citizen of the United States.

There is a delay from when a new citizen takes his or her oath at the citizenship ceremony until that citizen's alien registration number is placed in the SAVE database. If the registration is received within 14 days of the voter registration deadline, the County Recorder shall notify the registrant that further citizenship proof may be necessary in order to assure that the voter is

registered on time. The correspondence shall indicate that the registrant may present his or her naturalization papers to the Recorder to satisfy the proof of citizenship requirement.

If a registrant provides a number that cannot be validated by the SAVE system, the County Recorder shall take all reasonable steps necessary to obtain the alien registration number from the registrant, including, but not limited to, contacting the voter by phone and sending correspondence. The registrant is not officially registered until they satisfy the proof of citizenship requirement. If the County Recorder obtains the alien registration number from the registrant, the Recorder may enter the alien registration number on the form and validate the number through the SAVE system. If the number is validated, the Recorder may use the date the original form was signed as the registration date. If after 120 days, the registrant has not provided a valid alien registration number, the County Recorder shall send the registrant correspondence stating that the registration form has been rejected and the reason why along with a new voter registration form.

17) If the driver license number entered on the voter registration form was issued on or before October 1, 1996, or the driver license type is "F" (foreign or out of country) or "N" (commercial foreign or out of country), the Recorder shall take the following steps:

a. Ensure the driver license number was entered correctly. If the Recorder determines it was not, the Recorder shall correct the driver license number on the county system and the new driver license number match will be reported on the statewide voter registration database (VRAZ) the next day.
b. If the driver license number was entered correctly, check the current database to determine if the registrant is currently registered to vote in that county. If the voter is registered to vote in that county and is only updating the voter registration information, no citizenship proof is required.
c. If it is determined that the voter is a first time registrant or is reregistering in a different county, check to see if other citizenship documents were provided with the voter registration application. If the registrant provided other satisfactory proof of citizenship, the registration should be accepted.
d. If no satisfactory proof of citizenship is provided, the voter registration record should be cancelled and the voter should be contacted within ten business days of receipt of the registration form as provided by ARS § 16-134 with a request to provide proper proof of citizenship. (See SAMPLE FORMS: Uniform Correspondence: 2nd Notice that Citizenship Documentation Needed.)

18) A legible photocopy of pertinent pages of the registrant's United States passport is considered proof of citizenship. The pertinent pages of a

United States passport are considered the pages that contain the passport number, name, nationality, date of birth, gender, place of birth, and signature.

19) If a registrant submits tribal documentation or a tribal number on his/her form, it will be presumed valid as proof of citizenship for voter registration purposes.

20) The registrant may present to the Recorder the registrant's United States naturalization documents or other documents of proof that are established pursuant to the Immigration Reform and Control Act of 1986 as acceptable proof of citizenship.

21) The registrant may present or send the Recorder a legible photocopy of the applicant's birth certificate that verifies citizenship as acceptable proof of citizenship.

22) If a registration is conducted in person at the County Recorder's office, the County Recorder personnel shall indicate on the voter registration form (1) that the person provided proof of citizenship, (2) the type of citizenship proof provided, and (3) the name and initials of the employee who made the verification.

23) County Recorder personnel who attend naturalization ceremonies may assist the new citizens in registering to vote. The county personnel shall verify the alien registration number, write their name and initials on the

voter registration form, and date the form. If voters are registered at the ceremony from outside the county, the county personnel conducting the voter registration drive shall bundle the registrations by county and send them to the County Recorder with an official cover letter stating that all alien registration numbers were verified by County Recorder personnel. Neighboring counties may accept the voter registration form without further proof of citizenship. (See SAMPLE FORMS – Uniform Correspondence - County Recorder Naturalization Ceremony Certification.)

24) If all fields are filled in on a voter registration form they shall be entered into the voter registration system.

25) If a party preference entered on a voter registration form starts with "DEM" it shall be mapped to Democratic. "REP" or "GOP" shall be mapped to Republican.

26) If a party preference entered on a voter registration form is not on the list of recognized parties and is not a known party, then the party preference for that registrant will be "party not designated."

27) If a party preference entered on a voter registration form is not recognized as a political party by the state or a county, city or town, then that party preference shall be entered on the voter registration system but will be reported on all reports as "other."

28) If a paper application is for an existing active or inactive registrant in the county receiving the application and the application is received with the party preference field blank, do not change the existing party preference recorded on the registrants record. Do not change the party preference to "no party preference" on an existing record.

29) The voter registration change effective date shall be used to indicate the voter has submitted a new voter registration form changing their name, address, party preference or other information on their existing voter registration record. This date shall be used to determine election eligibility or eligibility to sign a particular petition.

30) The County Recorder shall issue a voter identification card to a registrant that should include the following information:
    - "Voter Identification Card"
    - county name
    - County Recorder contact information
    - voter ID number
    - party preference
    - date of voter registration
    - voter full name
    - voter full residence address
    - voter precinct/district information (congressional and legislative)

The mailer that accompanies the voter identification card should contain the same information on the card and the following information:

- information stating this is the voter's new card and to discard any old cards
- information on use of card (bring to polling location)
- where to call if information on card is incorrect
- County Recorder name
- how to find polling place instructions
- notification that the voter's name appears in the general register
- information on the identification at the polls requirement
- information on how to request an early ballot
- reasons a person needs to re-register

National Voter Registration Act Form Processing

Officials responsible for the registration of voters shall obtain a copy of the Order in Gonzalez v. Arizona, see supra, Note at page 8, and make themselves familiar with its contents.

Officials responsible for the registration of voters shall obtain a copy of the Federal Form and instructions developed by the United States Election Assistance Commission, *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx, and make themselves familiar with its contents.

Introduction

Pursuant to the Order, the responsible official may not reject a Federal Form because the applicant has not provided evidence of citizenship.

As a result of the Order, the Secretary of State, in consultation with the County Recorders, has examined procedures regarding the processing of Federal Forms in Arizona.

These procedures are consistent with the National Voter Registration Act (NVRA) and the Help American Vote Act (HAVA).

Federal Form Procedures

The following is the procedure for processing the Federal Form:

Receipt of Federal Form

The officer charged with evaluating a Federal Form shall first determine if the form contains name, date of birth (DOB), residence address and signature, of the applicant. If the form contains this information the officer shall proceed with the following steps. If the form is missing any one of the four pieces of information, the form is incomplete and correspondence shall be sent to the registrant asking for the additional information.

Federal Form Citizenship Check Box

If an applicant for voter registration fails to answer the question regarding citizenship included in the Federal Form (the citizenship check box) the county official shall notify the applicant of the failure and

provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election by placing the applicant in suspense and providing appropriate correspondence.

Arizona Driver License Number or AZ Non-Operating License Number Or Last Four Digits of Social Security Number

If the Federal Form arrives and contains an Arizona Driver License Number or Arizona Non-Operating License Number, the information contained on the form is entered into the voter registration system and compared to the Motor Vehicle Division database.

- If there is a match on Name, DOB and the license number and the license type indicates citizenship, the voter registration record is made active. The registrant does not need to provide any other information.
- If there is a match on Name, DOB and the license number and the license type indicates non-citizenship, the record is placed in suspense and correspondence shall be sent to the registrant asking for additional information indicating citizenship. *See Gonzalez v. Arizona*, No 06-1268-PHX-ROS, Order of August 20, 2008 at 11-12 (finding that there is a reasonable relationship between the type of license issued and a person's citizenship status).
- If there is not a match on Name, DOB, and the license number, the record is placed in

suspense and correspondence shall be sent to the registrant asking to correct the license number or to provide other identity information as required by HAVA.

- If the person includes their name, DOB, and last four digits of their Social Security Number, and there is a match, the voter registration record is made active. The registrant does not need to provide any other information.
- If the person includes their name, DOB, and last four digits of their Social Security Number and there is not a match, the record is placed in suspense and correspondence shall be sent to the registrant asking to correct the license number or to provide other identity information as required by HAVA.
- For any new voter registration that does not contain the driver license number or nonoperating identification license number or the last four digits of the social security number, the Secretary of State will match available data with the Arizona Motor Vehicle Division. If there is a match, data from MVD will be added to the record.

- The Secretary of State will assign a unique identifying number to any registrant who does not have a driver license number, nonoperating identification license number or social security number.
- If the registrant corrects the information or provides other satisfying identification as identified in HAVA, the registrant's voter registration record will be made active.

Alien Registration Number

If the Federal Form arrives and contains an Alien Registration Number, the information contained on the form is entered into the system and compared to the SAVE database.

- If there is a match on Name, DOB and the Alien Registration Number and the SAVE database indicates citizenship, the voter registration record is made active.
- If there is a match on Name, DOB and the Alien Registration Number and the SAVE database indicates non-citizenship, the record is placed in suspense and correspondence shall be sent to the registrant asking for additional information indicating citizenship.
- If there is not a match on Name, DOB, or license number, the record is placed in suspense and correspondence shall be sent to the registrant asking for information to correct the record. *See* 42 U.S.C. 15483 (a)(5)(A).If the registrant corrects the information or provides other satisfying identification as identified in HAVA, the registrant's voter registration record will be made active.

Tribal Identification

If the Federal Form arrives and contains tribal identification, the information contained on the form is entered into the system and the record is made active.

No License Number, Last Four Digits of Social Security Number, or any other identity information provided.

If the registrant does not provide a license number, last four digits of social security number, or any other identity information as prescribed by HAVA, the record is placed in suspense and correspondence shall be sent to the applicant asking for information to correct the record. *See* 42 U.S.C. 15483 (a)(5)(A).

FIRST TIME VOTERS IN THE STATE WHO REGISTER USING THE FEDERAL FORM

The officer shall determine whether the person is a first time voter in Arizona by comparing the information provided on the Form, including name, DOB, or other information to determine whether or not person has been registered. If the applicant is a First Time Voter who registers and does not provide copies of any of the documents described below in paragraphs 1 or 2, the applicant's registration shall be placed in suspense until the occurrence of one of the following:

1. The presentation to the appropriate official of a current and valid photo identification or;
2. The presentation of a copy satisfactory evidence of identity, which includes one of the following:
   - Your Arizona driver's license number or non-operating identification

license number that matches your record at the Arizona Motor Vehicle Division

- Your last four digits of Social Security Number that matches your record at the Social Security Administration
- Utility bill of the elector that is dated within ninety days of the date of the election. A utility bill may be for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television
- Bank or credit union statement that is dated within ninety days of the date of the election
- Valid Arizona Vehicle Registration
- Indian census card
- Property tax statement of the elector's residence
- Tribal enrollment card or other form of tribal identification
- Vehicle insurance card
- Recorder's Certificate
- Valid United States federal, state, or local government issued identification, including a voter registration card issued by the county recorder
-

Correspondence shall be sent to the applicant stating that:

> Federal law requires you to show proof of identification the first time you vote. Proof of identification includes a current and valid photo identification or a current utility bill, bank statement, government check, paycheck, or

> government document that shows your name and address. You may submit a copy of this identification to [the county recorder]. There are additional identification requirements that apply at the polling place in Arizona. Do not submit original documents, only copies.

If the federal form arrives and contains other acceptable HAVA identification, the information contained on the form is entered into the system.

- If there is a match on Name and address with the other forms of identification, the voter registration record is made active.
- If there is not a match on Name and address with the other forms, the record is placed in suspense and correspondence shall be sent to the registrant asking for information to correct the record.

FEDERAL FORM VOTER PUT ON SUSPENSE EARLY VOTING BY MAIL:

- Voter calls in to request early ballot.
    - Voter not able to be flagged due to suspense status, each county will identify a single point of contact in the appropriate department.
- Voter completes a PEVL or singular early ballot request card, online request, or written request:
    - Voter not able to be flagged due to suspense status, information will be forwarded to a to the single point of

contact who will attempt to contact voter to remedy registration issues by telephone, email, or standard mail in the most expeditious manner provided by the voter's information.

- Appropriate staff will advise applicant of information necessary to complete processing. Staff shall expedite the processing of the information to ensure that the person receives an early ballot as soon as possible.
- Upon that remedy (provision of applicable number or information) once the voter is registered successfully they are enabled to vote by mail because they have provided necessary identification under HAVA.

FEDERAL FORM VOTER PUT ON SUSPENSE EARLY VOTING IN PERSON:

- Voter presents themselves at an Early Voting location to vote.
- Voter not able to be flagged due to suspense status, Early Voting staff will be instructed to have voter vote a provisional ballot and obtain the necessary identification information following same process as at the polls on Election Day.
- In the processing of the provisional ballot voter registration staff routinely checks the suspense list which they will do for Early Ballots cast as well.
- During the provisional processing, staff will review the source code for the registration looking for Federal Forms &/or the affidavit image.

- If the voter has provided the necessary clarifying information on the provisional form they will be put on the voter registration file, their provisional accepted, and their ballot will move on for tabulation.

FEDERAL FORM VOTER PUT ON SUSPENSE GOES TO POLLS ON ELECTION DAY:

- Voter will not appear in the signature roster due to suspense status, per standard procedure the voter will be instructed to vote a provisional ballot and board workers will obtain the necessary identification information :
    - ID: Provisional form will be circled "Yes"
    - NO ID: Provisional form will be circled "NO"—conditional provisional process applies.
- In the processing of the provisional ballot voter registration staff routinely checks the suspense list.
- During the provisional processing, staff will review the source code for the registration looking for federal forms &/or the affidavit image.
- If the voter has provided necessary clarifying information they will be put on the voter registration file, their provisional accepted, and their ballot will move on for tabulation.
- If the voter has not provided the necessary clarifying information and their registration issue cannot be resolved, then they will not be put on the voter registration file and their

provisional disposition will be "voter not registered".

FEDERAL FORMS; DISTRIBUTION AT NATURALIZATION CEREMONIES

County Recorder personnel who attend naturalization ceremonies may assist the new citizens in registering to vote. County Recorder personnel who bring copies of the State Form shall also bring copies of the Federal Form and must make either available to the applicant. If the applicant uses the Federal Form, county personnel shall bundle the registrations by county and send them to the County Recorder with an official cover letter.

RESPONDENT'S BRIEF

No. 12-71

FILED
JAN 14 2013
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In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE, and BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the National Voter Registration Act's mail voter registration provisions preempt an Arizona law requiring rejection of federal mail voter registration forms that are unaccompanied by additional state-mandated documentation.

PARTIES TO THE PROCEEDING

Gonzalez Respondents, who were Plaintiffs-Appellants in the lead case below, are: Jesus M. Gonzalez; Bernie Abeytia; Debbie Lopez; Georgia Morrison Flores; Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Arizona Hispanic Community Forum; Common Cause; and Project Vote.

ITCA Respondents, who were Plaintiffs-Appellants in a later-filed, consolidated case below, are: The Inter-Tribal Council of Arizona; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and Hopi Tribe.

Petitioners, who were Defendants-Appellees below, are: the State of Arizona; Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constabile, in her official capacity as Yavapai County Election Director; Laura Dean-Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official capacity as Graham County Election Director; Donna Hale, in her official capacity as La Paz County Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Sadie Jo Tomerlin, in her

PARTIES TO THE PROCEEDING – Continued

official capacity as Gila County Recorder; Linda Eastlick, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; LeNora Fulton, in her official capacity as Apache County Recorder; Juanita Murray, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Suzie" Sainz, in her official capacity as Santa Cruz County Recorder; Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County Recorder; and Sue Reynolds, in her official capacity as Yuma County Election Director.

Other parties before the Ninth Circuit in their official capacities were Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Laurette Justman, Navajo County Recorder; and Kelly Dastrup, former Navajo County Election Director.

CORPORATE DISCLOSURE STATEMENT

Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; and Project Vote are incorporated as nonpartisan, nonprofit 501c(3) corporations. Common Cause is incorporated as a nonpartisan, nonprofit 501c(4) corporation. Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Common Cause; and Project Vote have no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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RELEVANT STATUTES

The National Voter Registration Act, 42 U.S.C. §1973gg, provides in relevant part:

Findings and purposes

(a) Findings

The Congress finds that –

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are –

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this sub chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

Section 1973gg-2 of the National Voter Registration Act, 42 U.S.C. §1973gg-2, provides in relevant part:

National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office –

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person –

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

Section 1973gg-4 of the National Voter Registration Act, 42 U.S.C. §1973gg-4, provides in relevant part:

Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

Section 1973gg-7 of the National Voter Registration Act, 42 U.S.C. §1973gg-7, provides in relevant part:

§1973gg-7. Federal coordination and regulations

(a) In general

The Election Assistance Commission –

(1) in consultation with the chief election officers of the States, shall prescribe such

regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2) of this section –

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that –

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

The entire text of the National Voter Registration Act, 42 U.S.C. §§1973gg to 1973gg-7, is reproduced in the Petitioners' Petition Appendix at 1h-28h.

STATEMENT OF THE CASE

In 1993, Congress enacted the National Voter Registration Act (NVRA) to establish several uniform procedures to register to vote in federal elections "in addition to any other method of voter registration

provided for under State law[.]" 42 U.S.C. §1973gg-2(a) (1993) (amended 1996). One provision of the NVRA requires states to "accept and use" a mail voter registration form promulgated by the U.S. Election Assistance Commission ("Federal Form"). *See* App. to Br. for Gonzalez Resp'ts ("App.") 4-5. Over the last 20 years, millions of Americans across the country have registered to vote using this simple postcard form.

This case involves the voter registration provision of the Arizona Taxpayer and Citizen Protection Act ("Proposition 200"), which requires state election officials to reject voter registration applications unless they are accompanied by certain documentation identified in the statute as proof of United States citizenship. *See* Joint App. ("JA") 167-80 (ARIZ. REV. STAT. ANN. ("A.R.S.") §16-166 (2004) (amended 2010)). Voter registrants who submit the Federal Form but who do not provide the additional documentation required by Proposition 200 are rejected for voter registration.

The Ninth Circuit, sitting en banc, applied this Court's well-established test under the Elections Clause to conclude that Arizona's refusal to accept Federal Forms (unless accompanied by the documentation set out in Proposition 200) departs from the mandate that all states "accept and use" the Federal Form and is superseded by the National Voter Registration Act. Pet'r's Petition Appendix ("Pet. App.") 10c-43c.

Congressional authority to make or change federal election rules is plenary, including the authority to establish a mechanism for registration in federal

elections such as the uniform federal postcard. Because Arizona rejects properly-completed Federal Forms when they do not also satisfy additional requirements under Proposition 200, Arizona's practice conflicts with the NVRA and must yield.

I. Statutory Background

A. The National Voter Registration Act

The National Voter Registration Act of 1993 ("NVRA") establishes several national procedures for registration to vote in federal elections. The statute includes findings that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and declares a purpose of the NVRA to "establish procedures that will increase the number of eligible citizens who register to vote." 42 U.S.C. §1973gg(a), (b) (1993). Congress chose to fulfill its purposes by mandating use of a uniform mail registration application and by requiring states to establish procedures by which individuals could register to vote in federal elections when applying for a driver's license (the so-called "motor-voter" rules) or when visiting certain public agencies. §1973gg-2(a).

Under the NVRA, individuals may register to vote in federal elections by mailing a simple, universal postcard to the local election official. *See* App. 4-5. The content of the national voter registration form ("Federal Form") is set forth by Congress and the

NVRA requires all states to "accept and use" the Federal Form.[1]

The NVRA requires the U.S. Election Assistance Commission ("EAC")[2] to promulgate the Federal Form and to follow specific requirements when the agency designs the Federal Form. *See* 42 U.S.C. §1973gg-7(a) (1993) (amended 2002). The Federal Form may require only the information necessary for election officials to assess the eligibility of the applicant, "shall include a statement that specifies each eligibility requirement (including citizenship)," must contain an attestation that the applicant meets each eligibility requirement and must require the signature of the applicant under penalty of perjury. §1973gg-7(b). The Federal Form must have printed on it the voter eligibility requirements and state the "penalties provided by law for submission of a false voter

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[1] The mail registration provisions of the NVRA were modeled on postcard registration programs then existing in approximately half of the states, covering well more than half of the nation's population. The NVRA provided that the Federal Form would be made widely available and could be used to register a voter anywhere. The NVRA placed particular emphasis on making the card available to organized voter registration programs. 42 U.S.C. §1973gg-4(b) (1993).

[2] The NVRA initially vested the Federal Election Commission with the authority to design the Federal Form. *See* 42 U.S.C. §1973gg-7. In 2002, Congress shifted the NVRA's federal coordination responsibilities from the Federal Election Commission to the U.S. Election Assistance Commission. *See* 42 U.S.C. §15532 (2002).

registration application." §1973gg-6 (1993) (amended 2002).

The NVRA prohibits the EAC from including on the Federal Form "any requirement for notarization or other formal authentication." §1973gg-7(b)(3).

Neither the language instructing the EAC on the contents of the Federal Form nor the provision requiring its acceptance by states permit states to require additional information with the Federal Form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the Federal Form. *See* 42 U.S.C. §1973gg-4(2). The NVRA specifically provides, "*in addition to* any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office . . . by mail application pursuant to section 1973gg-4 of this title" and "[*i*]*n addition to* accepting and using the [federal] form . . . a state may develop and use a mail voter registration form. . . ." §1973gg-2(a) (emphasis added); §1973gg-4(a)(2) (emphasis added).

1. The Federal Form

Pursuant to its authority under the NVRA, the EAC adopted regulations designing the Federal Form in a postcard format. *See* 11 C.F.R. §9428.5(b) (2009) ("The application shall consist of a 5" by 8"

application card of sufficient stock and weight to satisfy postal regulations.").

The Federal Form contains several elements: the registration form, general instructions on how to fill out the form, and state-specific instructions. App. 4-5. The state-specific instructions inform registrants which boxes on the form are required to be completed in order to be registered in that state. For example, Mississippi registrants are instructed that they need not write in the box requesting their race because election officials do not collect this information in Mississippi. App. 14. By contrast, North Carolina registrants are asked to provide their race in the box requesting their race. App. 18. As directed by Congress, the Federal Form is a complete application on the mail form; neither the Federal Form nor the state-specific instructions require registrants to provide additional documents or information that is not already requested on the application form.

The Federal Form requires each applicant to check a box at the top of the application indicating U.S. citizenship and states that if the applicant checked "No" to the citizenship question, "do not complete the form." App. 4. The Federal Form further requires the applicant to sign the bottom of the form and swear or affirm under penalty of perjury that he or she is a U.S. citizen and further that, "[i]f I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." *Id.*

The cover of the Federal Form pamphlet states "For U.S. Citizens" and the General Instructions begin with: "If you are a U.S. citizen. . . ." App. 1, 2. The General Instructions further explain: "All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election." App. 2.

The Federal Form's application instructions open with: "Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen [and age 18]. If you answer no to either of these questions, you may not use this form to register to vote." App. 3. The Federal Form's state-specific instructions also inform Arizona registrants: "To register in Arizona you must: be a citizen of the United States. . . ." App. 7.

The NVRA's Federal Form provisions allowed registrants to overcome procedural barriers that still existed in the states when the NVRA was enacted. For example, Federal Form registrants were no longer subject to arbitrary rejection based on their answers to questions such as one posed to North Carolina college students regarding whether they had "abandoned" their parents' homes or satisfaction of a requirement in Arkansas that registrants sign the state form in four different places with the exact same signature. *Voter Registration: Hearing on H.R. 3023, H.R. 3950, and H.R. 5121 Before the Subcomm. on Elections of the Comm. on H. Admin.*, 100th Cong.

at 244 (1988) (prepared statement of William T. Robinson, Chairman of the Board, Churches' Committee for Voter Registration/Education); *id.* at 727 (testimony of Johnnie Pugh).

Federal Form registrants were also able to overcome racially discriminatory practices that lingered following enactment of the Voting Rights Act of 1965, including the refusal of local jurisdictions to put satellite registration facilities in minority neighborhoods, imposition of excessive identification requirements for minority voter registrants and additional scrutiny of U.S. citizenship of Latino and Asian American registrants. *Id.* at 35 (testimony of Dr. Arthur S. Flemming, Chairman, Citizens Commission on Civil Rights).

In the 2008 presidential election alone, 28 million citizens used the Federal Form to register to vote by mail, in person, or as part of a voter registration drive.[3]

2. The NVRA's Safeguards Against Fraud

The mail registration provisions of the NVRA have a number of safeguards to prevent voter fraud,

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[3] *See* U.S. ELECTION ASSISTANCE COMMISSION, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY ("EAC Report 2008"), *available at* www.eac.gov/research/election_administration_and_voting_survey.aspx.

including an attestation clause on the Federal Form that sets out the requirements for voter eligibility, requiring registrants to sign the Federal Form under penalty of perjury and imposing criminal penalties on persons who knowingly and willfully engage in fraudulent registration practices. In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. Finally, the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable. *See* Pet. App. 41c-42c n.28.

Congress considered, and rejected, allowing states to require additional documentation of U.S. citizenship with the Federal Form. Members in both Houses proposed amendments that would expressly allow states to require that an individual provide additional documentation of his or her citizenship before being allowed to register. But those efforts were defeated in the House and in the Senate precisely *because* they made registration too cumbersome and thus undermined the central purpose of the NVRA. *See* H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49 (rejecting an amendment to the NVRA which would have provided that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration" because it was not "consistent with the purposes

of [the NVRA]" and "could effectively eliminate or seriously interfere with the mail registration program of the Act.") (Conf. Rep.).

B. Arizona's Proposition 200

Arizona's Proposition 200 is a voter initiative measure adopted in 2004 in order to "discourage illegal immigration." JA 168 (A.R.S. §16-166). Proposition 200 states that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship."[4] JA 167. The official voter information pamphlet accompanying Proposition 200 included statements in support of the initiative explaining: "The Initiative will prevent non-citizens from being able to register to vote in Arizona", "ensuring that illegal aliens who are not entitled to vote or obtain certain benefits

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[4] In addition to the voter registration provision, Proposition 200 requires state and local agencies to verify the immigration status of applicants for public benefits and requires voters to show identification at the polls on Election Day. JA 176, 178-80. The public benefits provisions of Proposition 200 barred undocumented immigrants from programs for which they were already ineligible under federal law. *See* Letter from Terry Goddard, Arizona Attorney General, to Anthony D. Rodgers, Director, Arizona Health Care Cost Containment System (Nov. 12, 2004), *available at* www.azag.gov/sites/default/files/sites/all/docs/Opinions/2004/I04-010.pdf.

cannot subvert the law to access them", "For too long, our porous borders have allowed millions of immigrants to illegally enter the United States, circumventing our generous immigration laws and undermining our sovereignty. . . ." Tr. Ex. 1 at 6, 7, Record 627, 627.[5]

Proposition 200's registration provision provides that "the county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship" and sets out a limited number of documents that registrants must produce in order to prove their citizenship.[6] JA 173-75 (A.R.S. §16-166(F) (2004), *invalidated by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012)); *see also* Tr. Ex. 4 at 43, Record 650, 650 ("The County Recorder must reject any registration that is not accompanied by satisfactory evidence of United States citizenship."). Voters already on the rolls are "grandfathered in" and do not have to provide Proposition 200 documentation unless they move to a different county in Arizona and

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[5] In *Calik v. Kongable*, the Arizona Supreme Court held that the language in a contested proposition's publicity pamphlet is helpful in determining the voters' intent in enacting the proposition and that "the electorate was entitled to rely on this description of the intent or effect of the initiative proposal." 990 P.2d 1055, 1059 (Ariz. 1999).

[6] Several documents listed in Proposition 200 as "satisfactory evidence of citizenship" either do not exist or do not prove U.S. citizenship, thus further narrowing the ability of registrants to comply with the registration provision. A.R.S. §16-166(F). These include Bureau of Indian Affairs cards, tribal treaty cards, the number of the certificate of naturalization, and an out of state driver's license. *See, e.g.*, JA 249-50, 260.

re-register to vote. JA 175 (A.R.S. §16-166(G) (2004 (amended 2010)).

Under Proposition 200, Arizona counties reject all voter registration forms that are not also accompanied by the state-required documentation, including Federal Forms under the NVRA and federal voter registration forms promulgated by the U.S. Department of Defense under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[7] *See* JA 250 ("Without this proof [of citizenship], a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship." (citation omitted)).[8]

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[7] The NVRA's provisions related to the Federal Form are similar to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§1973ff – 1973ff-7 (1986), which permits men and women serving in the military and U.S. citizens living overseas to register to vote with a postcard application. *See* 42 U.S.C. §1973ff-1(a)(4) ("Each State shall . . . use the official post card form (prescribed under section 1973ff of this title) for simultaneous voter registration application and absentee ballot application"). Since implementing Proposition 200, Arizona has rejected UOCAVA forms from military and overseas applicants when they are not accompanied by the documentation required by Proposition 200. The rejected UOCAVA federal registration applications in the court record are primarily from military servicemen and women, some serving stateside and others serving abroad at the time their forms were rejected for voter registration. *See* Tr. Ex. 896, Record 336, 340.

[8] Although required to do so, the Arizona Secretary of State does not "make the [Federal Form] available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter

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Registrants rejected under Proposition 200 are required to submit a new voter registration application accompanied by documentation that satisfies the Proposition 200 requirements. *See* Tr. Ex. 4 at 47, Record 650, 650 (if a registrant does not provide proof of citizenship, "the County Recorder shall send the registrant correspondence stating that the registration form has been rejected and the reason why along with a new voter registration form."); *id.* at 285 (providing uniform correspondence to rejected registrants: "Let this letter serve as notification that we have not yet received documentation of citizenship for purposes of voter registration. Be advised that you ***are not*** a registered voter in <County Name> County until we receive a new registration form containing one of the following. . . ."). If the registrant complies with Proposition 200 he is added to the rolls as of the date he submitted a new application, not the original date. *Id.* at 54.

The Arizona voter registration form does not contain all of the safeguards present in the Federal Form to ensure that non-citizens don't register to vote. In contrast to the Federal Form, *see supra* at A.2, Arizona's registration form includes instructions on the Proposition 200 requirements but no changes

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registration programs." 42 U.S.C. §1973gg-4(b). Instead, the Arizona Secretary of State keeps a stack of Federal Forms behind the counter in his office in downtown Phoenix and only provides a Federal Form to individuals who come to the office and request one. Tr. Ex. 916 at 147:13-150:5, Record 627, 628.

to the registration form itself to include additional affirmations of citizenship. App. 24-27. The Arizona form lacks a checkbox at the top of the form for the applicant to indicate U.S. citizenship. App. 24. Instead, Arizona places the citizenship checkbox at the bottom of the form. *Id.* Arizona's form requires the applicant to swear to the veracity of the information on the form but does not again state the requirement of U.S. citizenship near the signature line. *Id.* Finally, the Arizona form does not state the penalties for providing false information in general and the specific consequences for non-citizens who claim U.S. citizenship on the voter registration form. *Id.*

II. Factual Background

Following enactment of Proposition 200, over 31,000 individuals were rejected for voter registration in Arizona. JA 263. Less than one-third of the rejected registrants subsequently successfully registered to vote. JA 264. Reflecting the demographic composition of Arizona voter registrants overall, more than 80% of the rejected voters were not Latino. JA 263.

Voter registration through community-based drives in Maricopa County, Arizona's largest county, plummeted 44%. Tr. Ex. 966, Record 741, 741. The proportion of all voter registrations in Maricopa County attributable to community-based drives decreased from 24% in 2004 to 7% in 2005, 5% in 2006 and 6% in 2007. *Id.* at 8-11. Throughout Arizona,

voter registrations attributable to community drives has remained low – 5% in 2009-2010 and 11% in 2007-2008.[9]

Individuals whose voter registration forms are rejected for failure to provide Proposition 200 documentation include Arizona residents who have a driver's license issued before October 1, 1996 (such as those over age 33), who do not have a current Arizona driver's license (including students, new state residents and people with disabilities that do not permit them to drive), or who are naturalized citizens coded "Foreigner" in the state's motor vehicles database.[10]

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[9] *See* U.S. ELECTION ASSISTANCE COMMISSION, "THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009-2010: A REPORT TO THE 112TH CONGRESS JUNE 30, 2011," *available at* www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf; U.S. ELECTION ASSISTANCE COMMISSION, "THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2007-2008: A REPORT TO THE 111TH CONGRESS JUNE 30, 2009," *available at* www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20The%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202007-2008.pdf.

[10] Arizona contends that compliance with Proposition 200's documentation requirement is easily accomplished by writing the number of the registrant's driver's license on the form. State Pet'rs' Br. on the Merits at 19 ("[a]pproximately ninety percent of *voting-age* Arizonans possess driver's licenses") (emphasis added to highlight failure to consider citizenship). However, Arizona makes no effort to show how many Arizona voting-age citizens can use their driver's licenses to register to vote because their driver's licenses were issued after October 1996 and are not coded "Foreigner" in the state's database. Similarly, Arizona makes no effort to show how many Arizonans retain access to

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The Pima County Recorder testified that her mother, who was born in New Mexico, could not satisfy the documentation requirements to register to vote under Proposition 200. Tr. Ex. 930 at 90:15-91:3, Record 627, 628.

Proposition 200 requires rejected voter registrants to register again in person or make photocopies of citizenship documents such as U.S. birth certificates and passports, enclose the documents in an envelope with a new registration application, attach proper postage and mail the envelope to the county recorder.

A. Treatment of Naturalized Citizens

Proposition 200 singles out naturalized citizens for different treatment, often immediately rejecting them for voter registration and forcing them to apply a second time. Proposition 200 creates an automatic "rejection loop" for naturalized citizens by providing that applicants can register to vote by writing the "number of the certificate of naturalization" on the registration form which must then be verified by the County Recorder with the federal government. JA 174-75 (A.R.S. §16-166(F)). Because the number of the

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their Alien Registration Numbers or how many Arizonans possess tribal ID cards so that these numbers that can be written on the registration form in satisfaction of Proposition 200. The fact that tens of thousands of Arizona registrants were rejected after the law went into effect demonstrates that many registrants' driver's licenses (or other identifying numbers) alone do not satisfy Proposition 200 requirements.

certificate of naturalization cannot be verified with the federal government, every naturalized citizen who writes his naturalization certificate number on the registration form is rejected and forced to reapply.[11] Similarly, most naturalized citizens are immediately rejected for voter registration when they provide their driver's license numbers on their voter registration applications because, unbeknownst to them, the Arizona motor vehicles database applies "Type F-Foreigner" flags to the driver's license records of individuals who initially obtained their licenses when they were legal permanent resident immigrants (or other non-citizens lawfully residing in the U.S.). The "Foreigner" flag is not visible on the driver's license itself and thus there is no way for the license holder to know that he is coded as a "Foreigner" in the database, or to know that he may update his motor vehicle record after naturalization. Although Arizona election officials are aware that naturalized citizens who register to vote are likely to have vestigial "Foreigner" flags in their driver's license records, election officials still automatically reject and request a new voter registration application from all registrants

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[11] Under Proposition 200, Arizona requested on its voter registration form that applicants provide their "number of the certificate of naturalization." JA 174-75 (A.R.S. §16-166(F)). During this litigation, Arizona conceded that the number of the certificate of naturalization could not be verified with the federal government and amended its voter registration form to request that applicants provide their former Alien Registration Numbers.

whose driver's license shows a "Foreigner" flag in the database. *See* JA 262.[12]

Because naturalization certificates state on their face that it is a federal offense to photocopy the certificate, naturalized citizens who wish to avoid committing a crime by photocopying the certificate are forced to register in person at the county recorder's office with their naturalization certificates. Tr. Ex. 961, Record 625, 625; *see* JA 174 (A.R.S. §16-166(F)) (providing that a registrant can mail the county recorder a "*photocopy*" of a U.S. birth certificate or passport but requiring a "*presentation* to the county recorder of the applicant's United States naturalization documents." (emphasis added)).

B. The Federal Form Has Not Led to Non-Citizen Voter Registration in Arizona

There is no evidence that a non-citizen has registered to vote using the Federal Form in Arizona. With respect to non-citizen registration in general, contrary to the assertion by Petitioners ("Arizona"), the district court did not find that voter fraud was a

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[12] Respondent Jesus Gonzalez was twice rejected for voter registration under Proposition 200. On the first occasion, Mr. Gonzalez applied to register to vote on the day he became a U.S. citizen and provided, as instructed by the Arizona registration form, the number of his certificate of naturalization. Following the rejection of his registration application, Mr. Gonzalez attempted to register to vote using his driver's license number and was informed that his driver's license number could not be accepted under Proposition 200. Record 224-25 (Tr. Transcript).

significant problem. State Pet'rs' Br. on the Merits at 21. On the contrary, following trial the district court found that Arizona had produced only some "instances" in which non-citizens had registered to vote and even fewer in which non-citizens had cast a ballot. JA 294. Most important, the district court cited evidence that the small number of non-citizens who had registered to vote had done so mistakenly and without understanding that they were not eligible. JA 267-68.

In all, the district court found that Arizona had provided evidence that ten non-citizens were proven to have registered to vote (four of whom had voted) in 2005 and nine non-citizens were proven to have registered to vote (five of whom had voted) in 2007. *Id.* The evidence amounts to nine voters having cast ballots out of 2,734,108 registered voters in Arizona during this same period.[13]

The Ninth Circuit concluded, when denying the stay of its mandate, that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud." *Gonzalez v. Arizona*, No. 08-17094, Dkt. No. 232 at 8 (9th Cir. June 7, 2012) (order denying stay) (citing various provisions of 42 U.S.C. §1973gg (1993)).

The EAC is statutorily required to report on the impact of the NVRA every two years and, in the two

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[13] ARIZONA SECRETARY OF STATE, "STATE OF ARIZONA REGISTRATION REPORT" (June 1, 2008), *available at* www.azsos.gov/election/voterreg/2008-06-01.pdf.

decades since enactment of the NVRA, it has not identified any election-related fraud associated with the Federal Form. *See, e.g.*, U.S. ELECTION ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009-2010, A REPORT TO THE 112TH CONGRESS, JUNE 30, 2011 ("EAC Report 2009-2010"), *available at* www.eac.gov/registration-data/.[14]

Although Proposition 200 states that its purpose is to combat undocumented immigration (JA 167-68), Arizona can identify no instances in which undocumented immigrants registered or voted in Arizona. Much to the contrary, and as the Arizona Secretary of State's office wrote, the "strong desire to remain in the United States and fear of deportation outweigh [non-citizen's] desire to deliberately register to vote before obtaining citizenship. Those who are in the county illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation." JA 166.

The scattered instances of non-citizen voter registration fail to establish any pattern of actual voter fraud in Arizona, much less that the use of the

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[14] Of the prospective jurors who claimed not to be citizens (thereby avoiding jury duty) and had their registrations canceled, Arizona does not know whether any of them were actually non-citizens or if they voted. JA 267. Election officials in Arizona's largest county testified that they believed some U.S. citizens claimed not to be citizens in order to avoid jury duty. Tr. Ex. 936 at 91:4-9, Record 627, 628; Tr. Ex. 935 at 7:20-25, 8:1-14, Record 627, 628.

Federal Form has any relationship to voter fraud in the state.[15]

By contrast, the number of registrants whose Federal Forms were rejected under Proposition 200 is very real. The record in the case demonstrates that the rejected Federal Form registrants were Democrats and Republicans in equal numbers, almost one-half were under the age of 30, and a majority of those who indicated a race said they were white. Tr. Ex. 896, Record 336, 340.

C. The EAC Declines to Change the Federal Form Instructions to Reflect Proposition 200's Documentation Requirements

As part of its obligation to confer with the states on the design of the Federal Form, in March 2006, the EAC considered a request by Arizona that the Federal Form state-specific instructions be amended to inform Arizona registrants that acceptance of their Federal Forms would be conditioned on satisfaction of the requirements of Proposition 200.

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[15] Arizona tries to buttress its claims of non-citizen voter fraud by describing unrelated instances in which voter registrations were rejected for incompleteness, illegibility and mistakes in the address. However, Arizona's county recorders testified that when registration forms are missing names, addresses, and signatures they cannot be processed and also that such forms are immediately (and properly) rejected. *Compare* State Pet'rs' Br. on the Merits at 16 *with* Tr. Ex. 937 at 11:9-17, Record 627, 628.

The EAC declined Arizona's request, explaining "the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4)." JA 181-82.

The decision of the EAC was consistent with the precedent it established one year earlier when it denied, with the unanimous support of its commissioners, a request by Florida to amend the Federal Form state-specific instructions to inform registrants that their Federal Forms would be conditioned on their furnishing additional information regarding mental capacity.[16] The EAC stated: "Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." Letter from Gavin Gilmour, EAC Associate General Counsel, to Dawn Roberts, Director of the Division of Elections (Florida) (July 26, 2005).

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[16] *See* U.S. Election Assistance Commission, Position Statement: Commissioner Ray Martinez III, On The Matter Regarding EAC Tally Vote Dated July 6, 2006: "Arizona's Request For Accommodation" (July 10, 2006), *available at* www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf.

The EAC explained:

> Under Florida's policy, State officials would take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their Federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither "accepted" nor "used" by the State. The language of the NVRA mandates that the Federal form, without supplementation, be accepted and used by States to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal form is subject only to HAVA's verification mandate. 42 U.S.C. §15483.

Id.

III. Procedural History

Gonzalez Respondents filed this action in May 2006 challenging the voter registration and other provisions of Proposition 200.[17] The district court

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[17] While *Gonzalez* was pending in the district court, a second group of parties filed a similar complaint against the State of Arizona and successfully sought consolidation into *Gonzalez* (ITCA parties).

denied Gonzalez Respondents a preliminary injunction on their NVRA claim. Pet. App. 1f-3f. On appeal, the Ninth Circuit limited its analysis to one provision of the NVRA (allowing states to promulgate registration forms for federal elections in addition to accepting the Federal Form), leading it to conclude that the language of the NVRA allowed Arizona to impose its state requirements on top of the Federal Form. Pet. App. 17d (*Gonzalez I*). The case returned to the district court on the merits, and the district court granted summary judgment to Arizona on the NVRA issue based on the Ninth Circuit's analysis. Pet. App. 1e-10e.

After trial on the remaining issues, a new panel of the Ninth Circuit took up the entire case and found the earlier panel decision regarding the NVRA to be "clear error." Pet. App. 53a-54a (*Gonzalez II*). The *Gonzalez II* panel held that Proposition 200's additional documentation requirements are preempted by the NVRA when registrants use the Federal Form. Pet. App. 61a.

The Ninth Circuit, sitting en banc, concluded that Proposition 200's additional documentation requirements are superseded by the NVRA. Pet. App. 42c-43c (*Gonzalez III*). The en banc decision was not closely divided; eight of the ten judges on the panel found that the NVRA provision requiring states to "accept and use" the Federal Form superseded Proposition 200's rejection of Federal Forms when the forms did not meet additional state requirements.

The Ninth Circuit examined the NVRA and Proposition 200 and concluded that the two statutes addressed the same subject – voter registration by mail for federal elections – and that they were in conflict. Pet. App. 19c-20c. The Ninth Circuit approached the preemption question by considering "the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures." Pet. App. 29c. However, because under Proposition 200 county recorders reject every Federal Form that does not also satisfy the additional documentation requirements, the Ninth Circuit concluded that "under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." Pet. App. 31c. The Ninth Circuit concluded that Proposition 200 further conflicted with the NVRA by creating a conflict between state and federal registration procedures and by undermining the NVRA's goal of streamlining the registration process. Pet. App. 36c.

The Ninth Circuit concluded that "the NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" Pet. App. 59c (emphasis added).

Chief Judge Kozinski concurred and joined the majority in concluding the "best construction of the statute" was the preemptive reading of the NVRA.

Pet. App. 95c. Chief Judge Kozinski did not adopt the novel preemption test urged by Arizona but applied the traditional Elections Clause analysis. *Id.* He further explored whether the NVRA's requirement that Arizona "accept and use" the Federal Form should be construed to mean that states cannot impose additional requirements on registrants who submit the Federal Form. He reviewed the text of the NVRA, which he found "readily susceptible to the interpretation of the majority" and noted that requiring registrants to meet two sets of proof requirements would be "redundant" and "secondary" and would "sacrific[e] national uniformity." Pet. App. 89c.

Following the en banc decision, Arizona asked the Ninth Circuit to stay its mandate. The Ninth Circuit declined, concluding that Arizona failed to demonstrate the necessary irreparable harm. *Gonzalez v. Arizona*, No. 08-17094, Dkt. No. 232 at 7, 8 (9th Cir. June 7, 2012) (order denying stay). On June 28, 2012, this Court denied Arizona's application for a stay of the Ninth Circuit's mandate. *Arizona v. Abeytia*, No. 11-1189 (U.S. June 28, 2012) (order denying stay). This Court granted Arizona's petition for certiorari on October 15, 2012.

Following issuance of the Ninth Circuit's mandate, the district court ordered that Arizona "shall not reject Federal Forms from those who seek to register

to vote for the reason that they have not provided proof of citizenship under [Proposition 200]." JA 382.[18]

SUMMARY OF ARGUMENT

This is a case in which the plain language of the federal statute preempts a state statute that provides otherwise. Although Arizona portrays this dispute as a David and Goliath battle between a state and an overbearing federal government, in fact the issue here is between US. citizens, qualified and interested in voting who seek to follow a duly established federal procedure for registration to vote in federal elections and a state that refuses to permit those citizens to register and vote until they satisfy additional procedural requirements that exist entirely outside and at odds with the federal scheme.

[18] The assertion in the Brief of the County Petitioners that, following the district court's order, Arizona election officials adopted "a dual voter registration process" is false. Br. of the Twenty-Six Cnty. Recorders and Cnty. Election Dirs. Pet'rs at 36. Under the district court's order, Arizona maintains a unified voter registration process by accepting and using both state and Federal Forms for voter registration. All of Arizona's registered voters are entitled to vote in state and federal elections. In the brief, County Petitioners describe a bifurcated voter identification process in which election officials require voters who registered using the Federal Form to show additional voter identification at the polls on Election Day. *Id.* at 36-37. The district court has not yet had the opportunity to review whether this practice is consistent with its order of August 2012.

When Arizona election officials reject every Federal Form that is not accompanied by the documentation required by Proposition 200, they do not "accept and use [the Federal Form] for the registration of voters in elections for Federal office" as required by the NVRA. 42 U.S.C. §1973gg-4(a). The meaning of Proposition 200 is equally plain: "the county recorder shall reject any application for registration" that does not meet Proposition 200's requirements. JA 173 (A.R.S. §16-166(F)). None of Arizona's contorted interpretations of "accept and use," or mischaracterizations of its own registration procedures change the fact that Arizona election officials must under state directive reject as invalid any and all Federal Forms that do not satisfy Proposition 200's documentation requirements and that rejected registrants must complete a new registration application in order to be registered to vote. In enacting the NVRA, Congress did not mean the term "accept and use" to mean reject and refuse every form that does not satisfy separate and independent state requirements. Had Congress so intended, the "accept and use" would be meaningless and superfluous. No previous court in this case has accepted Arizona's eviscerating definition of "accept and use." On the contrary, Arizona's definition was rejected by the district court as well as the Ninth Circuit panel and en banc court.

Because congressional authority to regulate voter registration procedures in federal elections is well-established, "there is no colorable argument that [the

NVRA] goes beyond the ample limits of the Elections Clause's grant of authority to Congress." *Foster v. Love*, 522 U.S. 67, 71 (1997). Applying its broad powers under the Elections Clause, prior to and following its enactment of the NVRA, Congress has adopted laws regulating voter registration procedures for federal elections, preempting – without significant controversy – state laws in the process.

The power to regulate its own federal elections has always resided with the federal government; the Constitution conditionally grants states the authority to enact laws regulating federal elections unless and until Congress chooses to change or override those state laws by enacting new federal laws. When Congress enacts rules regarding federal elections that are different from the states, "the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879).

Here Arizona seeks to enforce a law that addresses the same subject as the NVRA – the procedure for registering to vote by mail in federal elections using the Federal Form. The two laws are straightforward: the NVRA requires state election officials to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (42 U.S.C. §1973gg-4(a)), and Proposition 200 requires election officials to "reject" those same Federal Forms when they fail to satisfy additional state requirements, JA 173 (A.R.S. §16-166(F)). The inevitable conclusion of this conflict is clear-cut and

well-established: Proposition 200 is void to the extent that it requires election officials to reject valid Federal Forms that the NVRA requires to be accepted.

To conclude otherwise requires construing the NVRA's plain language out of existence or departing dramatically from the established interpretation of the Elections Clause by narrowing Congressional authority to the simple design of a suggested Federal Form and nothing more.

No other provisions of the NVRA support Arizona's claim that states may layer their own requirements on top of the Federal Form and no subsequent federal law permits Arizona to use its state form to the exclusion of the Federal Form. *See, e.g.*, Help America Vote Act, 42 U.S.C. §15545(a) (2002) (providing that HAVA does not "supersede, restrict or limit the application of [the NVRA].").

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is also misplaced. Contradictory procedures, even in pursuit of the same ultimate goal, still present an irreconcilable conflict under the Elections Clause. First, Proposition 200 thwarts Congress's purpose in enacting the Federal Form provision by requiring county recorders to "reject" valid Federal Forms for failure to meet state requirements. Second, when Congress has acted to create a simple, uniform procedure for registration to vote in federal elections that can be used in any state, procedures that defeat this uniformity operate to thwart the statute. Under

the Elections Clause, Arizona may not substitute its own judgment for that of Congress with respect to balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters.

Finally, appropriate interpretation of the NVRA raises no significant constitutional difficulties. Both Congress and Arizona require U.S. citizenship as a qualification of voting. The NVRA creates additional procedures for registration to vote in federal elections; it does not change the qualifications of voters. The Federal Form's requirement that registrants indicate their U.S. citizenship and then swear or affirm under penalty of perjury that they are U.S. citizens is not a matter of qualification, but of process or "manner" squarely within congressional authority under Article I, Section 4 of the United States Constitution.

ARGUMENT

A common-sense reading of the NVRA, and Arizona's mandate that election officials "shall reject" Federal Forms that do not satisfy Proposition 200, demonstrates that the two statutes are in conflict and Proposition 200 must yield.

Arizona contends that although Congress is empowered to design a Federal Form, Congress cannot establish a procedure for voter registration in federal elections, and states are free to condition acceptance of the Federal Form on the registrant's satisfaction of

additional state requirements. Arizona's constrained reading of the Elections Clause is inconsistent with this Court's decisions and strips Congress of its constitutional authority to regulate federal elections.

Arizona assumes for itself a power that it has not been granted – the power to override a procedure for voter registration in federal elections that was established by Congress. Although states may establish voter registration procedures for federal elections, when Congress chooses to require states to "accept and use" the Federal Form "in addition to" any state registration form, the federal registration rule preempts inconsistent state rules. *See* 42 U.S.C. §1973gg-4(b).

I. The Plain Language of the NVRA Compels the Conclusion that Arizona Does Not "Accept and Use" the Federal Form when It Automatically Rejects Voter Applications for Failure to Satisfy the Requirements of the State Form

Arizona's claim that Proposition 200 complies with the NVRA's "accept and use" provision flouts the plain language of the NVRA. While the NVRA requires states to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (§1973gg-4(a)), Proposition 200 provides that "[t]he County Recorder *shall reject* any application for registration," (JA 173 (A.R.S. §16-166(F))), including a Federal Form, that does not meet Proposition 200 documentation requirements. JA 250-51 ("Without [meeting the additional documentation

requirements], a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship." (citation omitted)).

Arizona contorts the ordinary meaning of "accept and use" when it argues that "accept" means to refuse voter registration applications because they do not contain "verification from outside sources." State Pet'rs' Br. on the Merits at 40. Similarly, Arizona argues that it "use[s]" the Federal Form because, when implementing Proposition 200, it is "[u]sing the Federal Form to deny registrations to those who have not provided evidence of citizenship." *Id.*

Not surprisingly, Arizona does not discuss the meaning of "reject" in Proposition 200's mandate that the county recorder "shall reject any application for registration" that does not satisfy Proposition 200. JA 173 (A.R.S. §16-166(F)). "Reject" is defined as "*to refuse to accept*, consider, submit to, take for some purpose, or use." MERRIAM-WEBSTER DICTIONARY, "REJECT" (online ed. 2013) (emphasis added).

Thus, under Arizona's tortured reading of the NVRA, the statutory requirement that every state "shall accept and use" the Federal Form, §1973gg-4(a)(1), is the equivalent of the nonsensical command that every state "shall accept and reject" the Federal Form. Or, just as absurdly, Arizona claims that a state can satisfy the "accept and use" mandate by

taking delivery of Federal Forms and then using them to line garbage cans.

Arizona argues that an examination of its procedures demonstrates that it does "accept and use" the Federal Form. *See* State Pet'rs' Br. on the Merits at 40 ("Arizona 'accepts' the Federal Form by receiving it willingly and 'uses' the form by employing it as a tool to verify voter eligibility."). On the contrary, Arizona does not process the Federal Forms that are unaccompanied by Proposition 200 documentation, or consider whether they establish eligibility, because Arizona rejects the forms immediately as invalid.

Arizona's contention that it accepts, processes and then denies voter registration applications that fail to comply with Proposition 200 is contradicted by the Secretary of State's Elections Procedures Manual, which has the force of law and directs local election officials in the conduct of elections. The Procedures Manual provides repeatedly that registration forms that do not satisfy Proposition 200 cannot be processed. *See, e.g.*, Tr. Ex. 4 at 43, Record 650, 650 ("The County Recorder must reject any registration that is not accompanied by satisfactory evidence of United States citizenship"); *id.* at 54 ("If a voter registration request is missing citizenship proof, the voter registration form shall be placed in a 'rejected' status"); *id.* at 47 (a registrant who does not provide Proposition 200 documentation shall be sent "correspondence stating that the registration form has been rejected and the reason why along with a new voter registration form"); *id.* at 44 ("If the form is not accompanied

by proper proof of citizenship, the voter registration form is not valid and either will not be entered into the system or if it was entered into the system, the record shall be canceled."); *id.* at 291 (uniform letter to registrants who fail to satisfy Proposition 200 states: "Your name will not be added to the voter registration file until we have received the new enclosed voter registration form with the required information.").

Under Proposition 200, a properly completed Federal Form does not trigger the registration process. Election officials do not evaluate the form and then deny the application. They "reject" the Federal Form itself because Proposition 200 requires them to do so.[19] Thus, instead of "accept[ing] and us[ing]" the Federal Form, when it fails to satisfy Proposition 200 Arizona election officials reject it as invalid. Congress could not have meant in the NVRA that "accept and use" means reject every form that does not satisfy separate state requirements.

Arizona analogizes the Federal Form to an employment application and claims that "[p]rospective employers may 'accept and use' a form application to consider qualified candidates, but still

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[19] *See, e.g.*, Tr. Ex. 936 at 38:1-6, Record 627, 628 (Dep. of the Maricopa County Elections Director) ("Q. Did you understand, as a result of that information from [the Arizona State Election Director], that counties must reject federal voter registration forms that do not include the proof of citizenship required by Prop 200? A. Correct.").

decline to give some of those applicants a job." State Pet'rs' Br. on the Merits at 40. The analogy misapprehends the voter registration process. The purpose of a job application process is to fill a limited number of positions by picking the strongest candidates for the job. The franchise is entirely different. First, there is no predetermined limit on the number of voters. Indeed, every eligible citizen is "qualified" and the state is not permitted to "decline to give some of those applicants a [ballot]" because other aspiring registrants impress them as being better citizens.[20]

A variety of further analogies by Arizona also mistake the issue in the case. Although in some settings multiple documents are required as part of a business transaction or government program (for example, a passport and visa may be required to enter a foreign country), it cannot be said in any of those contexts that one document is "accepted" without the other. And none of the analogies shed light on the question whether the NVRA's mandate that states "accept and use" the Federal Form allows

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[20] Arizona's attempt to analogize the registration process to traveling by airplane is equally misplaced. Arizona compares the Federal Form to an airline ticket, which it claims is only accepted when accompanied by photo identification. However, federal rules specifically provide that a traveler without photo ID may board an airplane. *See* Transportation Security Administration, "Acceptable IDs," www.tsa.gov/traveler-information/acceptable-ids ("Not having an ID, does not necessarily mean a passenger won't be allowed to fly. If passengers are willing to provide additional information, we have other means of substantiating someone's identity[.]").

states to condition their acceptance of the Federal Form on the registrant furnishing additional, state-mandated documentation.

No previous court in this case has accepted Arizona's contorted definition of "accept and use." On the contrary, Arizona's contention was rejected by the district court as well as the Ninth Circuit panel and en banc court. *See* JA 250-51 ("Without this proof, a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. . . . If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship." (citation omitted)); Pet. App. 8a (noting that Proposition 200 provides that the County Recorder "shall reject any application for registration" that is not accompanied by the additional documentation under Proposition 200).[21] Sitting en banc, the Ninth Circuit held that "Arizona's rejection of every Federal Form submitted without proof of citizenship

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[21] Justice Sandra Day O'Connor (sitting by designation on the *Gonzalez II* panel) commented during oral argument: "[T]he statute says 'each state shall accept and use' the federal form. Period. Then it says 'in addition to' accepting that form the state can go on and do certain other things. Now suppose we think that's pretty clear? Looks pretty clear to me." Oral Argument at 22:47-23:06, *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *available at* www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004290.

does not constitute 'accepting and using' the Federal Form." Pet. App. 31c.[22]

Arizona further contends that because the Federal Form is not a complete registration application, Arizona "accept[s] and use[s]" the Federal Form when it *receives* and *rejects* the Federal Form for failure to meet additional state requirements. Arizona's interpretation misconstrues the NVRA.

First, and most important, the NVRA provides that states must "accept and use" the mail voter registration application form "for the registration of voters in elections for Federal office," without provision for further steps in the state's registration process. 42 U.S.C. §1973gg-4(a)(1).

Second, the NVRA's emphasis on uniformity, through the requirement that states accept a mail registration form designed and promulgated by the federal government, "in addition to" any state forms, demonstrates that Congress did not intend for states to layer their own requirements on top of the Federal Form. 42 U.S.C. §1973gg-4(a)(2).

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[22] Conditioning acceptance of the Federal Form on submission of additional documents is not at all like state laws that require registrants to write a particular identification number in the Federal Form box for "ID Number." The Ninth Circuit found that Proposition 200 requires many registrants to locate personal documents, photocopy them and then pay extra postage to mail the documents to the county recorders and that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." Pet. App. 37c.

Third, the NVRA contemplates that the Federal Form will serve as a complete application when it instructs the EAC that the Federal Form "may require only such [information] as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration process." 42 U.S.C. §1973gg(7)(b). The NVRA further states that the federal registration form must include a statement that "specifies each eligibility requirement (including citizenship); contains an attestation that the applicant meets each such requirement; and requires the signature of the applicant, under penalty of perjury." *Id.*

Fourth, the NVRA specifically sought to avoid requiring mail registrants to complete additional steps in the registration process by providing that the Federal Form "may not include any requirement for notarization or other formal authentication[.]" *Id.*

Fifth, the NVRA's requirements for administration of voter registration also contemplate that properly completed Federal Forms would be sufficient for voter registration:

> In the administration of voter registration for elections for Federal office, each State shall – (1) ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the

> period provided by State law, before the date of the election[.]

42 U.S.C. §1973gg-6(a).

Thus, read as a whole, the NVRA establishes the Federal Form as a complete application that presents the necessary information to establish eligibility, and, when filled out correctly and signed, is sufficient to register to vote in federal elections.

II. Arizona's Refusal to "Accept and Use" the Federal Form Unless It Satisfies Proposition 200's Requirements Is Preempted by the NVRA

Because the power of Congress to regulate federal elections is paramount, Congress acted within its authority when, in the NVRA, it created a procedure for voter registration by mail. Proposition 200 is thus preempted to the extent that is requires rejection of Federal Forms for failure to satisfy additional state requirements.

A. The Power of Congress to Regulate Federal Elections Supersedes that of the States

Congress's authority to regulate the "times, places and manner" of congressional elections is

plenary.[23] The "broad authority" conferred on Congress by the Elections Clause gives Congress "general supervisory power" over federal elections:

> not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect.

Smiley v. Holm, 285 U.S. 355, 366, 367 (1932).

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[23] Art. I, §4, cl. 1 of the United States Constitution, known as the "Elections Clause," confers on Congress the power to override state laws and regulate directly the manner of holding congressional elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, §4, cl. 1.

An unbroken line of decisions by this Court affirms the authority of Congress to regulate federal elections. In *Ex Parte Siebold*, 100 U.S. 371 (1879), this Court upheld federal authority to impose penalties for violating laws governing the election of Members of Congress. The Court stated that with respect to federal elections, the "power of Congress over the subject is paramount." *Id.* at 384.

This Court used similar reasoning in *Ex Parte Yarbrough*, 110 U.S. 651 (1884), to reject a constitutional challenge to federal laws protecting voters in federal elections from racially-motivated intimidation and violence. The Court held that under the Elections Clause, Congress has unfettered authority to act when it "finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting[,]" and explained that this authority arises "from the necessity of the government itself that . . . the votes by which its members of congress and its president are elected shall be the *free* votes of the electors[.]" *Id.* at 662.

In *United States v. Classic*, the Court upheld congressional power to regulate party primaries and explained that state election rules must yield to congressional enactments. 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not

restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'" (citations omitted)).

Under its broad powers under the Elections Clause, prior to and following its enactment of the NVRA, Congress adopted laws regulating voter registration procedures for federal elections, preempting state laws in the process. For example, in the Voting Accessibility for the Elderly and Handicapped Act of 1984, Congress required states without mail voter registration procedures to "provide a reasonable number of accessible permanent registration facilities." 42 U.S.C. §1973ee-2(a) (1984). In the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, Congress required the states to "accept and process" the uniform federal form promulgated by the Department of Defense for the registration of voters in federal elections. 42 U.S.C. §1973ff-1(a)(2) (1986). In 2002, Congress enacted the Help America Vote Act ("HAVA") which requires states to request from voter registrants a driver's license number, the last 4 digits of a social security number, or to assign the registrant a unique identification number for the purpose of keeping better track of voters on the rolls. 42 U.S.C. §15483(a)(5)(A) (2002). In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE) to require states to send voter registration forms electronically to military and overseas voter

registrants. Nat'l Defense Authorization Act for Fiscal Year 2010, Subtitle H, Sec. 577, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

Because congressional authority to regulate voter registration procedures in federal elections is well-established, "there is no colorable argument that [the NVRA] goes beyond the ample limits of the Elections Clause's grant of authority to Congress." *Foster v. Love*, 522 U.S. 67, 71 (1997); *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (including "registration" among the election regulations contemplated by the Elections Clause).

B. Arizona's Documentation Requirement Conflicts with the NVRA and Must Yield

Arizona concedes, as it must, that under *Siebold*, a state law that conflicts with a federal election regulation is preempted. State Pet'rs' Br. on the Merits at 2. That is exactly the situation with respect to Proposition 200. *See* Pet. App. 59c ("[T]he NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" (emphasis added)).

Because the power to regulate federal elections is delegated conditionally to the states by the federal government through the Constitution, states have the authority to enact laws regulating federal elections as long as Congress has not chosen to change those state laws or create new laws. When Congress enacts rules

regarding federal elections that are different from the states, "the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)); *see Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (under the Elections Clause, states have the power to regulate federal elections "[u]nless Congress acts."). "Thus, it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).

In the context of federal elections, the Tenth Amendment can "only 'reserve' that which existed before [and] 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'" *U.S. Term Limits*, 514 U.S. at 802 (citing 1 Story §627). In *U.S. Term Limits*, this Court concluded that Arkansas lacked the authority to impose term limits on members of Congress, explaining that "[t]his conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution." 514 U.S. at 805.

In *Foster v. Love*, 522 U.S. 67 (1997), this Court struck down a Louisiana "open primary" law under which candidates who received a majority of votes in the October primary election would be declared the winners of their seats. The Court stated that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster*, 522 U.S. at 69 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974) and *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate")).

After concluding that Congress has the authority to set a uniform date for federal elections, this Court looked to whether the state and federal laws addressed the same subject and whether they were in conflict. Because Louisiana's open primary allowed for the final selection of congressional candidates for office on a day different than that specified by Congress in 2 U.S.C. §§1 and 7, the Court concluded that the Louisiana law was preempted. *Foster*, 522 U.S. at 72 ("[I]t is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.").

Similar to *Foster*, here Arizona seeks to enforce a law that addresses the same subject as the NVRA – the procedure for registering to vote in federal

elections with the Federal Form. Also as in *Foster*, the two laws are straightforward: the NVRA requires state election officials to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (42 U.S.C. §1973gg-4), and Proposition 200 requires election officials to "reject" those same Federal Forms when they fail to satisfy additional state requirements, JA 173 (A.R.S. §16-166(F)). The conclusion is the same in both cases: Proposition 200 is void to the extent that it requires election officials to reject valid Federal Forms that the NVRA requires to be accepted.[24]

Arizona contends that the Ninth Circuit should have concluded that Proposition 200 and the NVRA

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[24] Arizona cannot claim that in Elections Clause preemption cases, "[the Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." State Pet'rs' Br. on the Merits at 31-32 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). This Court has never employed a presumption against preemption in its Elections Clause cases because the regulation of federal elections was never an historic power of the states. *See U.S. Term Limits*, 514 U.S. at 802 (explaining that "the power to add qualifications [to serve in Congress] is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States" because the states have no reserved powers related to the national government); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) ("The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."). Most important, a presumption against preemption cannot save Proposition 200 because it conflicts with the NVRA.

can be carried out without conflict because their terms are consistent. State Pet'rs' Br. on the Merits at 37-39. Arizona's attempt to read the NVRA's "accept and use" mandate out of existence is foreclosed by *Foster*, which rejected the argument by Louisiana that even though it elected most candidates for congressional offices in an October primary election, the state law did not run afoul of the congressional mandate that federal elections be held in November because the state law regulated the "manner" of the election and federal law regulated the "time" of the election. 522 U.S. at 72-73. This Court refused to accept the state's distorted interpretation of 2 U.S.C. §7, and characterized Louisiana's position as "merely wordplay." *Id.*

The NVRA's "accept and use" requirement is also not changed or weakened by HAVA, 42 U.S.C. §§15301-15545. When it enacted HAVA in 2002, Congress again considered the contents of the Federal Form. The provisions of HAVA added several new check boxes to the Federal Form (one of which affirms U.S. citizenship).

Nothing in HAVA authorizes states to impose their own documentation requirements onto the Federal Form and HAVA's drafters anticipated that the statute might intersect with other related laws. Arizona simply cannot avoid HAVA's express language providing that HAVA does not "supersede, restrict or limit the application of NVRA." Pet. App. 40c (quotations omitted) (citing 42 U.S.C. §15545(a)). Although Arizona argues that HAVA reconsidered or superseded Congress's decision to allow a voter to

register with the Federal Form without additional documentation, the express language of HAVA provides otherwise.

Arizona argues that the NVRA's "accept and use" must be read to allow states to impose additional requirements on the Federal Form in order to be consistent with the statute as a whole. State Pet'rs' Br. on the Merits at 37-39. However, the one portion of the NVRA on which Arizona relies, 42 U.S.C. §1973gg-7(b)(1), simply instructs the EAC on the design and content of the Federal Form. Although states may follow these same guidelines in designing their own state forms, they can only use their state forms "[i]n addition to accepting and using the [Federal] form." 42 U.S.C. §1973gg-4(a)(2). Thus nothing in §1973gg-7(b)(1) permits Arizona to use its form to the exclusion of the Federal Form and nothing in the NVRA as a whole suggests that states may layer their own requirements on top of the federal procedures for registration.

The Ninth Circuit correctly identified three areas of conflict between Proposition 200 and the NVRA. Pet. App. 29c-30c. First, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it is not supplemented with additional documentation. Pet. App. 31c-32c. Second, Arizona's rejection of the Federal Form due to lack of additional documentation creates a conflict between state and federal registration procedures and is incompatible with the NVRA's delegation of authority to the EAC.

Pet. App. 34c. Third, Proposition 200 conflicts with the NVRA by undermining the NVRA's goal of streamlining the registration process. Pet. App. 36c. The Ninth Circuit concluded that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." *Id.*

To have reached the opposite conclusion, the Ninth Circuit would have had to read the NVRA's plain language out of existence or depart dramatically from the established interpretation of the Elections Clause and limit Congressional authority to simply designing the Federal Form and nothing more. Because the Ninth Circuit applied the traditional understanding of the scope of Congressional authority under the Elections Clause, it concluded that Congress may establish voter registration procedures and, because the statutes were in conflict, Proposition 200's requirement of additional documentation from Federal Form applicants is preempted.

None of this Court's cases on which Arizona relies examined whether a congressional enactment regulating federal elections preempted state law. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 101 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (declining to analyze whether the Bipartisan Campaign Reform Act exceeds Congress's Elections Clause authority because "Title I only regulates private parties' conduct, imposing no requirements upon States or state officials"); *see also Smiley v. Holm*, 285 U.S. 355, 372-73 (1932)

(concluding that "there is nothing in article 1, s 4" that precludes a state from using its normal legislative process to conduct congressional redistricting). The remainder of the cases is from the lower courts. None of the cases cited by Arizona upheld state voter registration practices in the face of a claim that they were inconsistent with the NVRA and none of the cases cited by Arizona support its contention that courts must defer to state laws that are inconsistent with federal laws on the same subject.

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is also misplaced. First, Proposition 200 thwarts Congress's purpose in enacting the Federal Form provision. *See* Pet. App. 31c-32c ("In contrast, Proposition 200's registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose."). Second, when Congress has acted to create a simple, uniform procedure for registration to vote in federal elections that can be used in any state, procedures that defeat this uniformity operate to thwart the statute. *See Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject-matter in hand coincidence is as ineffective as

opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").

The Court recently affirmed that even in the Supremacy Clause context, imposing state rules on top of federal rules can "conflict with the careful framework Congress adopted." *Arizona v. U.S.*, 132 S. Ct. 2492, 2502-03 (2012) (citations omitted). The Court further noted that "a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Id.* at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

Arizona cannot substitute its own judgment for that of Congress with respect to balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters. Congress chose to balance ensuring election integrity with facilitating voter registration by warning non-citizens not to complete the form, by stating the penalties for giving false information on the form (and specifically the penalties for false claim of citizenship), and by requiring registrants to check a box asserting their U.S. citizenship on the Federal Form and swear to their U.S. citizenship under penalty of perjury. The Ninth Circuit correctly observed that "the Elections Clause gives Congress the last word on how this concern [regarding the possibility of registration fraud] will be addressed in the context of federal elections." Pet.

App. 41c. Arizona must follow the NVRA whether or not it would have balanced the goals differently.[25]

Preserving the integrity of the electoral process is one of the stated purposes of the NVRA, and by all indications it has succeeded in fulfilling that purpose. Pet. App. 41c-42c (citing 42 U.S.C. §1973gg(b)(3)). The Federal Form has been used to register millions of voters nationwide over two decades without the alleged voter fraud problem its detractors feared ever coming to pass. Arizona has presented no evidence of voter fraud through use of the Federal Form, and twenty years of experience demonstrates that no such threat exists.

III. The Elections Clause Analysis Used Consistently in the Circuit Courts Is Persuasive

The courts of appeals have soundly rejected attempts by states to impose policies inconsistent with the NVRA. For example, in *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008) the Sixth Circuit held that Michigan was unlikely to succeed in defending its practice of removing

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[25] Similarly, whether or not Arizona considers the additional requirements of Proposition 200 to be a "burden" or "obstacle" to voting is beside the point. State Pet'rs' Br. on the Merits at 43 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)). The Ninth Circuit invalidated Proposition 200's registration requirement as applied to the Federal Form because it conflicted with the NVRA, not because it placed an unconstitutional burden on the right to vote.

registered voters from the rolls when the voters' registration cards were returned in the mail against a claim that the NVRA required an additional step in the removal process. The Sixth Circuit compared the NVRA's provisions to the challenged Michigan statute and concluded "that Michigan's undeliverable-voter-ID-card practice likely violates the clear language of the NVRA." 546 F.3d at 381.

Michigan argued that it could remove these voters because it did not consider them "registrants" as that term is used in the NVRA. *Id.* at 382. The Sixth Circuit rejected the state's attempt to re-define "registrant" in a way that allowed it to remove voters who are protected by the NVRA, reasoning:

> A federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses. If we were to adopt defendants' view, states could completely ignore the requirements of the NVRA, 42 U.S.C. §1973gg-6(d). We refuse to import such a reading to this statute.

Id. at 382-83.[25]

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[25] The Sixth Circuit's earlier decision in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), did not employ a different preemption analysis. Under the NVRA, the Federal Form includes a box in which the registrant writes an "ID Number." *See* App. 4. In *McKay*, the Sixth Circuit concluded that Tennessee was authorized by the federal Privacy Act to require its

(Continued on following page)

In *Charles H. Wesley Educ. Found., Inc. v. Cox*, the Eleventh Circuit held that the NVRA preempted Georgia's policy of rejecting voter registration forms mailed in bulk, reasoning:

> In essence, [Georgia's] claim is that the NVRA only requires that mailed registration forms be accepted when delivered both in a timely fashion *and* pursuant to additional state requirements. *See* 42 U.S.C. §1973gg-6(a)(1)(B),(D) . . . This argument is unpersuasive. By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.

408 F.3d 1349, 1354 (11th Cir. 2005).

In *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012), the Fourth Circuit also recently held that the NVRA overrides inconsistent state practices. The court concluded that Virginia's refusal to permit inspection of voter registration applications (with social security numbers redacted) was preempted by the plain language of the NVRA's disclosure requirements. *Id.* at 339. In response to Virginia's assertion that it had a policy interest in protecting individual privacy, the court explained: "It is not the province of this court, however, to strike the

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registrants to place their social security numbers in the box on the Federal Form and "Congress intended [the Privacy Act] to survive the more general provisions of the NVRA." *Id.* at 756.

proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting [the NVRA]."). *Id.*

The circuit courts of appeals have developed a consistent, persuasive approach to resolving questions of Elections Clause preemption. Under that analysis, not only must states comply with the NVRA's registration procedures, but where state practices conflict or are inconsistent with the NVRA state laws must yield.

IV. Appropriate Interpretation of the NVRA Raises No Significant Constitutional Difficulties

In an attempt to convert this case, at this quite late stage, into a constitutional challenge that it never filed, either as an independent lawsuit or as a cross-claim in this action, Arizona for the first time asserts that the doctrine of "constitutional avoidance" supports its eviscerated interpretation of the terms "accept and use" in the NVRA. State Pet'rs' Br. on the Merits at 46-47. Arizona argues that any construction giving practical meaning to the NVRA terms would render the law an unconstitutional federal establishment of "qualifications" on electors. *Id.* at 48-53. Raising the argument at this late stage has deprived both the district court and the court of appeals of the opportunity to address the issue; this "court avoidance,"

if you will, might be explained by the fact that Arizona's assertion reduces to the untenable argument that what the state itself characterizes as "evidence-of-citizenship," State Pet'rs' Br. on the Merits at 53, or "proof-of-citizenship," *id.* at 47, is the same as a "citizenship" qualification. Yet Arizona's recasting of Proposition 200 cannot transform procedural matters of evidence and documentation into substantive qualification.

A. Voter Registration Procedures Differ From Substantive Qualification of Citizenship, Which the Federal Government Embraces

In its brief, Arizona grapples with *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which this Court upheld the constitutionality of a congressional imposition of substantive voter qualifications of age and residency in direct contradiction of the decisions of states on qualifications. Arizona could have avoided its tortuous argument; the NVRA's procedural registration requirements are far from a congressional mandate of substantive voter qualifications. The NVRA does not remotely attempt to contradict a citizenship qualification or impose some sort of alternative, substitute "non-citizenship" requirement (such as geographic residency alone, for example). The federal law simply addresses what – strategic hyphens omitted – Arizona would concede is a manner of additional authentication of the agreed citizenship qualification. More specifically, the NVRA

establishes what may be required as authentication of citizenship for purposes of registration prior to being registered to vote.[27] This is not a matter of qualification, but of process or "manner" squarely within congressional authority under Article I, Section 4 of the U.S. Constitution.

It is now long-established that Congress may act, precisely as it has in the NVRA, to displace state regulation with respect to registration, voter protection, and fraud prevention – all matters encompassed within the NVRA registration procedure at issue here. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). Arizona cannot simply tack "proof" or "evidence" onto "citizenship" and by so doing convert process and "manner" regulations into substantive qualifications.

Because congressional authority to regulate federal elections is established, there are no knotty constitutional questions implicated by appropriately interpreting the plain language of the NVRA to supersede Proposition 200's rejection of Federal Forms that do not satisfy additional state documentation requirements. Arizona's attempt to supplant congressional regulations in an area where the Congress is constitutionally permitted to override state regulation, and impose its own, is unsupported by

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[27] For example, the NVRA does nothing to dictate what might be relevant and probative evidence of citizenship in a government challenge to the qualifications of someone who has voted.

Mitchell or any other case. Indeed, Arizona's argument for "constitutional avoidance" reduces to an exercise in its own constitutional "projection" – epitomizing Arizona's own desire to avoid constitutional authority that is plainly lodged with Congress.

B. Arizona's Attempt to Distinguish Court Precedent Approving Congressional Establishment of Elector Qualifications Demonstrates The Distinction Between Qualification and Registration Procedures

As suggested above, even if Arizona could somehow demonstrate that the NVRA establishes substantive elector qualifications, Arizona would have to distinguish *Mitchell* itself. The state's attempt to do so merely exposes its false alchemy in seeking to transform registration procedures into substantive qualifications. In seeking to distinguish the plurality view in *Mitchell* that the Fourteenth Amendment supports congressional adoption of elector criteria, Arizona casually shifts from characterizing Proposition 200 as imposing a "proof-of-citizenship" or "evidence-of-citizenship" requirement to addressing the issue as one of citizenship vel non. Again, no one disputes that all electors must be U.S. citizens, and Arizona's unsupported assumption that those who cannot timely meet the state's particular documentation requirements are necessarily non-citizens has no basis in fact or logic. The concern in this case is about U.S. citizens who avail themselves of the opportunity

to register to vote using the Federal Form and Arizona's rejection of their registration forms on the grounds that the registrants must engage in an additional state-mandated procedure to be registered to vote.

Thus, the proposition that Arizona sets up to prove – that the Fourteenth Amendment does not empower Congress to require states to allow non-citizens to vote – is a complete irrelevance. Were this case at this stage the appropriate forum for a constitutional determination under the Fourteenth Amendment, the question would be whether Congress could conclude that more onerous authentication requirements could affect, in a constitutionally remediable way under the Fourteenth Amendment, the voting rights of particular citizens. On this more relevant question, Arizona is completely and peculiarly silent.

That silence and Arizona's tortured attempt to convert manner into substance demonstrate why the late-asserted argument of "constitutional avoidance" should not influence the Court's construction of the NVRA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 12-71

In The
Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE, and BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO BRIEF FOR GONZALEZ RESPONDENTS

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Register To Vote In Your State By Using This Postcard Form and Guide

For U.S. Citizens

General Instructions

Who Can Use this Application
If you are a U.S. citizen who lives or has an address within the United States, you can use the application in this booklet to:

- Register to vote in your State,
- Report a change of name to your voter registration office,
- Report a change of address to your voter registration office, or
- Register with a political party.

Exceptions
Please do not use this application if you live outside the United States and its territories and have no home (legal) address in this country, *or* if you are in the military stationed away from home. Use the Federal Postcard Application available to you from military bases, American embassies, or consular offices.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form.
North Dakota does not have voter registration.
Wyoming law does not permit mail registration.

How to Find Out If You Are Eligible to Register to Vote in Your State
Each State has its own laws about who may register and vote. Check the information under your State in the State Instructions. All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election. You **cannot** be registered to vote in more than one place at a time.

How to Fill Out this Application
Use both the Application Instructions and State Instructions to guide you in filling out the application.

- First, read the Application Instructions. These instructions will give you important information that applies to everyone using this application.
- Next, find your State under the State Instructions. Use these instructions to fill out Boxes 6, 7, and 8. Also refer to these instructions for information about voter eligibility and any oath required for Box 9.

When to Register to Vote
Each State has its own deadline for registering to vote. Check the deadline for your State on the last page of this booklet.

How to Submit Your Application
Mail your application to the address listed under your State in the State Instructions. Or, deliver the application in person to your local voter registration office. The States that are required to accept the national form will accept copies of the application printed from the computer image on regular paper stock, signed by the applicant, and mailed in an envelope with the correct postage.

First Time Voters Who Register by Mail
If you are registering to vote for the first time in your jurisdiction and are mailing this registration application, Federal law requires you to show proof of identification the first time you vote. Proof of identification includes:

- A current and valid photo identification or
- A current utility bill, bank statement, government check, paycheck or government document that shows your name and address.

Voters may be exempt from this requirement if they submit a **COPY** of this identification with their mail in voter registration form. If you wish to submit a **COPY**, please keep the following in mind:

- Your state may have additional identification requirements which may mandate you show identification at the polling place even if you meet the Federal proof of identification.
- Do not submit original documents with this application, only **COPIES**.

If You Were Given this Application in a State Agency or Public Office
If you have been given this application in a State agency or public office, it is your choice to use the application. If you decide to use this application to register to vote, you can fill it out and leave it with the State agency or public office. The application will be submitted for you. Or, you can take it with you to mail to the address listed under your State in the State Instructions. You also may take it with you to deliver in person to your local voter registration office.
Note: The name and location of the State agency or public office where you received the application will remain confidential. It will not appear on your application. Also, if you decide not to use this application to register to vote, that decision will remain confidential. It will not affect the service you receive from the agency or office.

Application Instructions

Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen and whether you will be 18 years old on or before Election Day. If you answer no to either of these questions, you may not use this form to register to vote. However, state specific instructions may provide additional information on eligibility to register to vote prior to age 18.

Box 1 — Name
Put in this box your full name in this order — Last, First, Middle. Do not use nicknames or initials.
Note: If this application is for a change of name, please tell us in **Box A** *(on the bottom half of the form)* your full name before you changed it.

Box 2 — Home Address
Put in this box your home address (legal address). Do **not** put your mailing address here if it is different from your home address. Do **not** use a post office box or rural route without a box number. Refer to state-specific instructions for rules regarding use of route numbers.

Note: If you were registered before *but* this is the first time you are registering from the address in Box 2, please tell us in **Box B** *(on the bottom half of the form)* the address where you were registered before. Please give us as much of the address as you can remember.

Also Note: If you live in a rural area but do not have a street address, *or* if you have no address, please show where you live using the map in **Box C** *(at the bottom of the form).*

Box 3 — Mailing Address
If you get your mail at an address that is different from the address in Box 2, put your mailing address in this box. If you have no address in Box 2, you **must** write in Box 3 an address where you can be reached by mail.

Box 4 — Date of Birth
Put in this box your date of birth in this order — Month, Day, Year. *Be careful not to use today's date!*

Box 5 — Telephone Number
Most States ask for your telephone number in case there are questions about your application. However, you do **not** have to fill in this box.

Box 6 — ID Number
Federal law requires that states collect from each registrant an identification number. You must refer to your state's specific instructions for item 6 regarding information on what number is acceptable for your state. If you have neither a drivers license nor a social security number, please indicate this on the form and a number will be assigned to you by your state.

Box 7 — Choice of Party
In some States, you must register with a party if you want to take part in that party's primary election, caucus, or convention. To find out if your State requires this, see item 7 in the instructions under your State.

If you want to register with a party, print in the box the full name of the party of your choice.

If you do **not** want to register with a party, write "no party" or leave the box blank. Do **not** write in the word "independent" if you mean "no party," because this might be confused with the name of a political party in your State.
Note: If you do not register with a party, you can still vote in general elections and nonpartisan (nonparty) primary elections.

Box 8 — Race or Ethnic Group
A few States ask for your race or ethnic group, in order to administer the Federal Voting Rights Act. To find out if your State asks for this information, see item 8 in the instructions under your State. If so, put in Box 8 the choice that best describes you from the list below:

- American Indian *or* Alaskan Native
- Asian or Pacific Islander
- Black, *not of* Hispanic Origin
- Hispanic
- Multi-racial
- White, *not of* Hispanic Origin
- Other

Box 9 — Signature
Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that:

(1) You meet your State's requirements, and
(2) You understand **all** of Box 9.

Finally, sign your **full** name or make your mark, and print today's date in this order — Month, Day, Year.
If the applicant is unable to sign, put in **Box D** the name, address, and telephone number (optional) of the person who helped the applicant.

App. 4

Voter Registration Application

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? ☐ Yes ☐ No
Will you be 18 years old on or before election day? ☐ Yes ☐ No
If you checked "No" in response to either of these questions, do not complete form.
(Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)

This space for office use only.

1 ☐ Mr. ☐ Miss ☐ Mrs. ☐ Ms. | Last Name | First Name | Middle Name(s) | ☐ Jr ☐ II ☐ Sr ☐ IV

2 Home Address | Apt. or Lot # | City/Town | State | Zip Code

3 Address Where You Get Your Mail If Different From Above | City/Town | State | Zip Code

4 Date of Birth ____ Month Day Year

5 Telephone Number (optional)

6 ID Number - (See item 6 in the instructions for your state) ____

7 Choice of Party (see item 7 in the instructions for your State)

8 Race or Ethnic Group (see item 8 in the instructions for your State)

9 I have reviewed my state's instructions and I swear/affirm that:
- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required.
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.

Please sign full name (or put mark) ▲

Date: ___/___/___ Month Day Year

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a **change of name**, what was your name before you changed it?

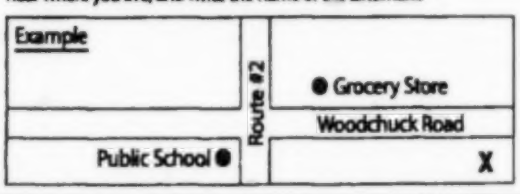
A ☐ Mr. ☐ Miss ☐ Mrs. ☐ Ms. | Last Name | First Name | Middle Name(s) | ☐ Jr ☐ II ☐ Sr ☐ IV

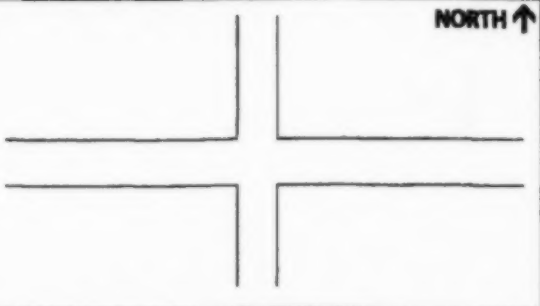
If you were **registered before but this is the first time you are registering from the address in Box 2**, what was your address where you were registered before?

B Street (or route and box number) | Apt. or Lot # | City/Town/County | State | Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C
- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live.
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.





If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D

Mail this application to the address provided for your State.

FOR OFFICIAL USE ONLY

FIRST CLASS STAMP NECESSARY FOR MAILING

OFFICIAL ELECTION MAIL
Authorized by the U.S. Postal Service ®

Print Application

State Instructions

Alabama

Updated: 03-01-2006

Registration Deadline — Voter registration is closed during the ten days preceding an election. Applications must be postmarked or delivered by the eleventh day prior to the election.

6. ID Number. Your social security number is requested (by authority of the Alabama Supreme Court, 17-4-122).
7. Choice of Party. Optional: You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box; however, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Alabama you must:
- be a citizen of the United States
- be a resident of Alabama and your county at the time of registration
- be 18 years old before any election
- not have been convicted of a felony punishable by imprisonment in the penitentiary (or have had your civil and political rights restored)
- not currently be declared mentally incompetent through a competency hearing
- swear or affirm to "support and defend the Constitution of the U.S. and the State of Alabama and further disavow any belief or affiliation with any group which advocates the overthrow of the governments of the U.S. or the State of Alabama by unlawful means and that the information contained herein is true, so help me God"

Mailing address:
Office of the Secretary of State
P.O. Box 5616
Montgomery, AL 36103-5616

Alaska

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide one of the following identification numbers; Alaska Driver's License or Alaska State Identification Card Number. If you do not have an Alaska Driver's License or Alaska State Identification Card, you must provide the last four digits of your Social Security Number. If you do not have any of these identification numbers, please write "NONE" on the form. A unique identifying number will be assigned to you for voter registration purposes. This information is kept confidential. Having this information assists in maintaining your voter record and may assist in verifying your identity (Title 15 of the Alaska Statutes).
7. Choice of Party. You do not have to declare a party affiliation when registering to vote. If you do not choose a party, you will be registered as Undeclared. Alaska has a closed primary election system. Each recognized political party has a separate ballot listing only candidates from that political party. Voters registered as a member of a political party may only vote that party's ballot. Voters registered as undeclared or non-partisan may choose one ballot from the ballots available.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Alaska you must:
- be a citizen of the United States
- be at least 18 years old within 90 days of completing this registration
- be a resident of Alaska
- not be a convicted felon (unless unconditionally discharged)
- not be registered to vote in another State

Mailing address:
Division of Elections
State of Alaska
PO Box 110017
Juneau, AK 99811-0017

Arizona

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your completed voter registration form must contain the number of your Arizona driver license, or non-operating identification license issued pursuant to A.R.S. § 28-3165, if the license is current and valid. If you *do not have* a current and valid Arizona driver license or non-operating identification license, you must include the last four digits of your social security number if one has been issued to you. If you do not have a current and valid driver license or non-operating identification license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the Secretary of State.

State Instructions

7. Choice of Party. If you are registered in a political party which has qualified for ballot recognition, you will be permitted to vote the primary election ballot for that party. If you are registered as an independent, no party preference or as a member of a party which is not qualified for ballot recognition, you may select and vote one primary election ballot for one of the recognized political parties.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arizona you must:
- be a citizen of the United States
- be a resident of Arizona and your county at least 29 days preceding the next election
- be 18 years old on or before the next general election
- not have been convicted of treason or a felony (or have had your civil rights restored)
- not currently be declared an incapacitated person by a court of law

Mailing address:
Secretary of State/Elections
1700 W. Washington, 7th Floor
Phoenix, AZ 85007-2888

Arkansas

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Optional. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arkansas you must:
- be a citizen of the United States
- live in Arkansas at the address in Box 2 on the application
- be at least 18 years old before the next election
- not be a convicted felon (or have completely discharged your sentence or been pardoned)
- not claim the right to vote in any other jurisdiction
- not previously be adjudged mentally incompetent by a court of competent jurisdiction

Mailing address:
Secretary of State
Voter Services
P.O. Box 8111
Little Rock, AR 72203-8111

California

Updated: 03-01-2006

Registration Deadline — 15 days before the election.

6. ID Number. When you register to vote, you must provide your California driver's license or California identification card number, if you have one. If you do not have a driver's license or ID card, you must provide the last four digits of your Social Security Number (SSN). If you do not include this information, you will be required to provide identification when you vote.
7. Choice of Party. Please enter the name of the political party with which you wish to register. If you do not wish to register with any party, enter "Decline to State" in the space provided.
California law allows voters who "decline to state" an affiliation with a qualified political party or who affiliate with a nonqualified political party to vote in the primary election of any qualified political party that files a notice with the Secretary of State allowing them to do so. You can call 1-800-345-VOTE or visit www.sos.ca.gov to learn which political parties are allowing nonaffiliated voters to participate in their primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in California you must:
- be a citizen of the United States
- be a resident of California
- be at least 18 years of age at the time of the next election
- not be imprisoned or on parole for the conviction of a felony
- not currently be judged mentally incompetent by a court of law

Signature is required. If you meet the requirements listed above, please sign and date the registration card in the space provided.

Mailing address:
Secretary of State
Elections Division
1500 11th Street
Sacramento, CA 95814

State Instructions

Colorado

Updated: 03-28-2008

Registration Deadline — 29 days before the election. If the application is received in the mails without a postmark, it must be received within 5 days of the close of registration.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or identification number. If you do not have a driver's license or state issued identification, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Colorado you must:
• be a citizen of the United States
• be a resident of Colorado 30 days prior to the election
• be 18 years old on or before election day
• not be confined as a prisoner or serving any part of a sentence under mandate

Mailing address:
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

Connecticut

Updated: 03-01-2006

Registration Deadline — 14 days before the election.

6. ID Number. Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.
7. Choice of Party. This is optional, but you must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Connecticut you must:
• be a citizen of the United States
• be a resident of Connecticut and of the town in which you wish to vote
• be 17 years old. You can vote when you turn 18
• have completed confinement and parole if previously convicted of a felony, and have had your voting rights restored by Registrars of Voters.
• not currently be declared mentally incompetent to vote by a court of law

Mailing address:
Secretary of State
Elections Division
30 Trinity Street
Hartford, CT 06106

Delaware

Updated: 02-07-2012

Registration Deadline — The 4th Saturday before a primary or general election, and 10 days before a special election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Delaware you must:
• be a citizen of the United States
• be a permanent resident of Delaware
• be at least 18 years old on the date of the next general election
• felons are eligible to vote if certain requirements are met: fines and sentence completed at least five years prior to application date; felony convictions can not be disqualifying felonies, which are murder, sexual offenses, or crimes against public administration involving bribery or improper influence or abuse of office.
• not be mentally incompetent

Mailing address:
State of Delaware
Office of the State Election Commissioner
905 S. Governors Ave., Suite 170
Dover, DE 19904

State Instructions

District of Columbia

Updated: 10-29-2003

Registration Deadline — 30 days before the election.

6. ID Number. Federal law now requires that all voter registration applications must include either the applicant's driver's license number or the last four digits of the applicant's social security number in order to be processed.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in the District of Columbia you must:
- be a citizen of the United States
- be a District of Columbia resident at least 30 days preceding the next election
- be at least 18 years old on or preceding the next election
- not be in jail for a felony conviction
- not have been judged "mentally incompetent" by a court of law
- not claim the right to vote anywhere outside D.C.

Mailing address:
District of Columbia Board of Elections & Ethics
441 4th Street, NW, Suite 250
Washington, DC 20001-2745

Florida

Updated: 11-30-2011

Registration Deadline — 29 days before the election.

6. ID Number. If you have one, you must provide your Florida driver's license number or Florida identification card number. If you do not have a Florida driver's license or identification card, you must provide the last four digits of your social security number. If you have not been issued any of these numbers, you must write the word "NONE."
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are requested, but not required, to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Florida you must:
- be a citizen of the United States
- be a legal resident of both the State of Florida and of the county in which you seek to be registered
- be 18 years old (you may pre-register if you are at least 16)
- not be adjudicated mentally incapacitated with respect to voting in Florida or any other State, or if you have, you must first have your voting rights restored.
- not be a convicted felon, or if you are, you must first have your civil rights restored if they were taken away.
- swear or affirm the following: "I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, that I am qualified to register as an elector under the Constitution and laws of the State of Florida, and that all information in this application is true."

Mailing address:
State of Florida
Department of State
Division of Elections
The R.A. Gray Building
500 South Bronough St, Rm 316
Tallahassee, Florida 32399-0250

Georgia

Updated: 03-28-2008

Registration Deadline — The fifth Monday before any general primary, general election, or presidential preference primary, or regularly scheduled special election pursuant to the Georgia Election Code. In the event that a special election is scheduled on a date other that those dates prescribed by the Georgia Election Code, registration would close on the 5th day after the call.

6. ID Number. Federal law requires you to provide your full GA Drivers License number or GA State issued ID number. If you do not have a GA Drivers License or GA ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a GA Drivers License or Social Security number, a unique identifier will be provided for you.
7. Choice of Party. You do not have to register with a party to take part in that party's primary, caucus or convention.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Georgia you must:
- be a citizen of the United States
- be a legal resident of Georgia and of the county in which you want to vote

State Instructions

• be 18 years old within six months after the day of registration, and be 18 years old to vote
• not be serving a sentence for having been convicted of a felony
• not have been judicially determined to be mentally incompetent, unless the disability has been removed

Mailing address:
Elections Division
Office of the Secretary of State
1104 West Tower
2 Martin Luther King, Jr. Dr. SE
Atlanta, GA 30334-1505

Hawaii

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application (Hawaii Revised Statutes, Section 11-15).
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Race or ethnic group information is not required for voter registration.
9. Signature. To register in Hawaii you must:
• be a citizen of the United States
• be a resident of the State of Hawaii
• be at least 16 years old (you must be 18 years old by election day in order to vote)
• not be incarcerated for a felony conviction
• not be adjudicated by a court as "non compos mentis"

Mailing address:
Office of Elections
State of Hawaii
802 Lehua Avenue
Pearl City, HI 96782

Idaho

Updated: 03-01-2006

Registration Deadline — 25 days before the election.
6. ID Number. Enter your driver's license number. If you have no driver's license, enter the last 4 digits of your social security number.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Idaho you must:
• be a citizen of the United States
• have resided in Idaho and in the county for 30 days prior to the day of election
• be at least 18 years old
• not have been convicted of a felony, and without having been restored to the rights of citizenship, or confined in prison on conviction of a criminal offense

Mailing address:
Secretary of State
P.O. Box 83720
State Capitol Bldg.
Boise, ID 83720-0080

Illinois

Updated: 08-14-2012

Registration Deadline — 28 days prior to each election.

6. ID Number. Your driver's license number is required to register to vote. If you do not have a driver's license, at least the last four digits of your social security number are required. If you have neither, please write "NONE" on the form. A unique identifier will be assigned to you by the State.
7. Choice of Party. Party registration or preference is not required for voter registration. However, when you apply for a primary ballot, you must indicate your party preference for that election.
8. Race or Ethnic Group. Leave blank.
9. Signature. A signature is required. If signature is missing from registration form, you will be notified your registration is incomplete.
To register in Illinois you must:
• be a citizen of the United States
• be a resident of Illinois and of your election precinct at least 30 days before the next election
• be at least 18 years old on or before the next election
• not be in jail for a felony conviction
• not claim the right to vote anywhere else

Mailing address:
State Board of Elections
2329 S. MacArthur Boulevard
Springfield, IL 62704

State Instructions

Indiana

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your state voter ID number is your ten digit Indiana issued driver's license number. If you do not possess an Indiana driver's license then provide the last four digits of your social security number. Please indicate which number was provided. (Indiana Code 3-7-13-13)
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Indiana you must:
- be a citizen of the United States
- have resided in the precinct at least 30 days before the next election
- be at least 18 years of age on the day of the next general election
- not currently be in jail for a criminal conviction

Mailing address:
Election Division
Office of the Secretary of State
302 West Washington Street,
Room E-204
Indianapolis, IN 46204-2743

Iowa

Updated: 03-28-2008

Registration Deadline — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others.* Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.

*If you fail to meet the voter registration deadlines above you can register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website: www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf.

6. ID Number. Your ID number is your Iowa driver's license number (or Iowa non-driver identification number) if you have one, if not then the last four digits of your social security number. The ID number you provide will be verified with the Iowa Department of Transportation or the Social Security Administration.
7. Choice of Party. You may, but do not have to, register with a party in advance if you want to take part in that party's primary election. You may change or declare a party affiliation at the polls on primary election day.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Iowa you must:
- be a citizen of the United States
- be a resident of Iowa
- be at least 17-1/2 years old (you must be 18 to vote)
- not have been convicted of a felony (or have had your rights restored)
- not currently be judged by a court to be "incompetent to vote"
- not claim the right to vote in more than one place
- give up your right to vote in any other place

Mailing address:
Elections Division
Office of the Secretary of State
Lucas Building-1st Floor
321 E. 12th Street
Des Moines, IA 50319

Kansas

Updated: 03-01-2006

Registration Deadline — Postmarked or delivered 15 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nondriver's identification card number. If you do not have a driver's license or nondriver's identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a nondriver's identification card or social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. The number you provide will be used for administrative purposes only and will not be disclosed to the public. (KSA 25-2309).
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kansas you must:
- be a citizen of the United States
- be a resident of Kansas
- be 18 by the next election
- have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote
- not claim the right to vote in any other location or under any other name
- not be excluded from voting for mental incompetence by a court of competent jurisdiction

State Instructions

Mailing address:
Secretary of State
1st Floor, Memorial Hall
120 SW 10th Ave.
Topeka, KS 66612-1594

Kentucky

Updated: 02-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your full social security number is required. It is used for administrative purposes only and is not released to the public (KRS 116.155). No person shall be denied the right to register because of failure to include social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kentucky you must:
• be a citizen of the United States
• be a resident of Kentucky
• be a resident of the county for at least 28 days prior to the election date
• be 18 years of age on or before the next general election
• not be a convicted felon or if you have been convicted of a felony, your civil rights must have been restored by executive pardon
• not have been judged "mentally incompetent" in a court of law
• not claim the right to vote anywhere outside Kentucky

Mailing address:
State Board of Elections
140 Walnut Street
Frankfort, KY 40601-3240

Louisiana

Updated: 08-14-2012

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Louisiana driver's license number or Louisiana special identification card number, if issued. If not issued, you must provide at least the last four digits of your social security number, if issued. The full social security number may be provided on a voluntary basis. If the applicant has neither a Louisiana driver's license, a Louisiana special identification card, or a social security number, the applicant shall attach one of the following items to his application: (a) a copy of a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of applicant. Neither the registrar nor the Department of State shall disclose the social security number of a registered voter or circulate the social security numbers of registered voters on commercial lists (R.S. 18:104 and 154; 42 U.S.C. § 405).
7. Choice of Party. If you do not list a party affiliation, you cannot vote in the Presidential Preference Primary and party committee elections. Political party affiliation is not required for any other election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).

9. Signature. To register in Louisiana you must:
• be a citizen of the United States
• be a resident of Louisiana (Residence address must be address where you claim homestead exemption, if any, except for a resident in a nursing home or veteran's home who may select to use the address of the nursing home or veterans' home or the home where he has a homestead exemption. A college student may elect to use his home address or his address while away at school.)
• be at least 17 years old, and be 18 years old prior to the next election to vote
• not currently be under an order of imprisonment for conviction of a felony
• not currently be under a judgment of interdiction for mental incompetence

Mailing address:
Secretary of State
Attention: Voter Registration
P.O. Box 94125
Baton Rouge, LA 70804-9125

Maine

Updated: 08-14-2012

Registration Deadline — Delivered 21 business days before the election (or a voter may register *in-person* up to and including election day).

6. ID Number. You must list your valid Maine driver's license number. If you don't have a valid Maine driver's license, then you must provide the last four digits of your Social Security Number. Voters who don't have either of these forms of ID must write "NONE" in this space.

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless otherwise permitted by a political party).
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maine you must:
• be a citizen of the United States
• be a resident of Maine and the municipality in which you want to vote
• be at least 17 years old (you must be 18 years old to vote)

Mailing address:
Elections Division
Bureau of Corporations,
Elections and Commissions
101 State House Station
Augusta, ME 04333-0101

Maryland

Updated: 06-26-2008

Registration Deadline — 9:00 p.m. 21 days before the election.

6. ID Number. If you have a current, valid Maryland driver's license or a Motor Vehicle Administration identification card, you must enter the driver's license or identification number. If you do not have a current, valid Maryland driver's license or Motor Vehicle Administration identification card, you must enter at least the last 4 digits of your social security number. However, please note, the disclosure of your full Social Security number is voluntary. The statutory authority allowing election officials to request your full Social Security number is Election Law Article, Section 3-202, Annotated Code of Maryland. The number will be used only for registration and other administrative purposes. It will be kept confidential.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maryland you must:
• be a U.S. citizen
• be a Maryland resident
• be at least 18 years old by the next general election
• not be under guardianship for mental disability
• not have been convicted of buying or selling votes
• not have been convicted of a felony, or if you have, you have completed serving a court ordered sentence of imprisonment, including any term of parole or probation for the conviction.

Mailing address:
State Board of Elections
P.O. Box 6486
Annapolis, MD 21401-0486

Massachusetts

Updated: 03-01-2006

Registration Deadline — 20 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a current and valid Massachusetts' driver's license then you must provide the last four (4) digits of your social security number. If you have neither, you must write "NONE" in the box and a unique identifying number will be assigned to you.
7. Choice of Party. If you do not designate a party of political designation in this box, you will be registered as unenrolled. Unenrolled voters may participate in party primaries. However, an unenrolled voter must enroll in a party on the day of the Presidential Preference Primary in order to participate in that primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Massachusetts you must:
• be a citizen of the United States
• be a resident of Massachusetts
• be 18 years old on or before the next election
• not have been convicted of corrupt practices in respect to elections
• not be under guardianship with respect to voting
• not be currently incarcerated for a felony conviction

Mailing address:
Secretary of the Commonwealth
Elections Division, Room 1705
One Ashburton Place
Boston, MA 02108

Michigan

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or state issued personal identification card number. If you do not have a driver's license or state issued personal identification card, you must include the last four digits of your social security number. If you

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do not have a driver's license or a state issued personal identification card or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Michigan you must:
- be a citizen of the United States
- be 18 years old by the next election
- be a resident of Michigan and at least a 30 day resident of your city or township by election day
- not be confined in a jail after being convicted and sentenced

Notice: Michigan law requires that the same address be used for voter registration and driver license purposes. Therefore, if the residence address you provide on this form differs from the address shown on a driver license or personal identification card issued by the State of Michigan, the Secretary of State will automatically change your driver license or personal identification card address to match the residence address entered on this form. If an address change is made, the Secretary of State will mail you an address update sticker for your driver license or personal identification card.
Caution: If you register by mail, you must vote in person at your assigned precinct the first time you vote, unless you are:

- disabled as defined by state law;
- 60 years of age or older; or
- temporarily residing overseas.

Mailing address:
Michigan Department of State
Bureau of Elections
P.O. Box 20126
Lansing, MI 48901-0726

Minnesota

Updated: 12-31-2008

Registration Deadline — Delivered by 5:00 p.m. 21 days before the election (there is also election day registration at polling places).

6. ID Number. You are required to provide your Minnesota driver's license or state ID number to register to Vote. If you do not have a Minnesota driver's license or state ID then you will have to provide the last four digits of your social security number. If you have neither, please write "none" on the form.
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Minnesota you must:
- be a citizen of the United States
- be a resident of Minnesota for 20 days before the next election
- maintain residence at the address given on the registration form
- be at least 18 years old on election day
- if previously convicted of a felony, your felony sentence has expired or been completed, or you have been discharged from the sentence
- not be under a court-ordered guardianship in which the right to vote has been revoked
- not be found by a court to be legally incompetent to vote.

Mailing address:
Secretary of State
60 Empire Drive, Suite 100
St. Paul, MN 55103-1855

Mississippi

Updated: 05-07-2010

Registration Deadline — 30 days before the election.

6. ID Number. You are required to provide your current and valid driver's license number or, if you don't have one, the last four digits of your social security number.
7. Choice of Party. Mississippi does not have party registration. Therefore, you do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Mississippi you must:
- be a citizen of the United States
- have lived in Mississippi and in your county (and city, if applicable) 30 days before the election in which you want to vote
- be 18 years old by the time of the general election in which you want to vote
- have not been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, armed robbery, extortion, felony bad check, felony shoplifting, larceny, receiving stolen property, robbery, timber larceny, unlawful taking of a motor vehicle, statutory rape, carjacking, or bigamy, or have had your rights restored as required by law
- not have been declared mentally incompetent by a court

State Instructions

Note: State law changed by federal court order in 1998 and by state legislation in 2000. We now accept the form as registration for voting for all state and federal offices.

Mailing address:
Secretary of State
P.O. Box 136
Jackson, MS 39205-0136

Local county addresses:
You also may return completed applications to the county circuit clerk/registrar where you reside. A complete list of county circuit clerk/registrars is available on Mississippi's website at www.sos.ms.gov.

Missouri

Updated: 09-12-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number. Your completed voter registration form must also include the last four digits of your social security number. (Section 115.155, RSMo). If you do not have a driver's license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. Any electronic media, printouts or mailing labels provided under this section shall not include telephone numbers and social security numbers of voters. (Section 115.157, RSMo).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To vote in Missouri you must:
• be a citizen of the United States
• be a resident of Missouri
• be at least 17-1/2 years of age (you must be 18 to vote)
• not be on probation or parole after conviction of a felony, until finally discharged from such probation or parole
• not be convicted of a felony or misdemeanor connected with the right of suffrage
• not be adjudged incapacitated by any court of law
• not be confined under a sentence of imprisonment

Mailing address:
Secretary of State
P.O. Box 1767
Jefferson City, MO 65102-1767

Montana

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Montana driver's license number. If you do not have a Montana driver's license number then you must list the LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER. If you have neither a driver's license, nor a social security number, please write "NONE" on the form. The state of Montana will assign to you a unique identifying number.
7. Choice of Party. Montana does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Montana you must:
• be a citizen of the United States
• be at least 18 years old on or before the election
• be a resident of Montana and of the county in which you want to vote for at least 30 days before the next election
• not be in a penal institution for a felony conviction
• not currently be determined by a court to be of unsound mind
• meet these qualifications by the next election day if you do not currently meet them

Mailing address:
Secretary of State's Office
P.O. Box 202801
State Capitol
Helena, MT 59620-2801

Nebraska

Updated: 03-01-2006

Registration Deadline — The third Friday before the election (or delivered by 6 p.m. on the second Friday before the election).

6. ID Number. You must provide your Nebraska driver's license number. If you do not have a Nebraska driver's license number then you must list the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nebraska you must:
• be a citizen of the United States
• be a resident of Nebraska

State Instructions

• be at least 18 years of age or will be 18 years of age on or before the first Tuesday after the first Monday of November
• not have been convicted of a felony, or if convicted, have had your civil rights restored
• not have been officially found to be mentally incompetent

Mailing address:
Nebraska Secretary of State
Suite 2300, State Capitol Bldg.
Lincoln, NE 68509-4608

Nevada

Updated: 05-07-2010

Registration Deadline — The deadline for mail-in registration is the fifth Saturday before any primary or general election. In person registration remains available until 9:00 p.m. on the third Tuesday preceding any primary or general election. You may register to vote in person only by appearing at the office of the County Clerk/Registrar of Voters.

6. ID Number. You must supply a Nevada's Driver's License Number or Nevada ID Card Number if you have been issued one. If you do not have a Driver's License Number or Nevada ID Card Number, you must supply the last four digits of your Social Security Number. If you do not have a Social Security Number, please contact your County Clerk/Registrar of Voters to be assigned a unique identifier.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention. If you register with a minor political party, or as a Nonpartisan you will receive a Nonpartisan Ballot for the Primary Election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nevada you must:
• be a citizen of the United States
• have attained the age of 18 years on the date of the next election
• have continuously resided in the State of Nevada, in your county, at least 30 days and in your precinct at least 10 days before the next election
• have your civil rights restored if you were convicted of a felony
• not be determined by a court of law to be mentally incompetent
• claim no other place as your legal residence

Mailing address:
Secretary of State
Elections Division
101 North Carson Street
Suite 3
Carson City, NV 89701-4786

Applications may be returned to the Secretary of State's office at the address above, but to avoid possible delays, you are advised to return your completed voter registration applications directly to your local county election official.

Local county addresses:
To meet registration deadlines, especially during the two weeks before the close of the mail-in registration deadline, return completed applications to your respective County Clerk/Registrar of Voters. A complete list of County Clerk/Registrar of Voters and registration deadlines is available on Nevada's website: www.nvsos.gov.

New Hampshire

Updated: 03-01-2006

Registration Deadline — New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form, which must be received by your city or town clerk by 10 days before the election.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form. You need to fill in only Box 1 and Box 2 or 3.

The application should be mailed to your town or city clerk at your zip code. These addresses are listed on the Secretary of State web site at www.state.nh.us/sos/clerks.htm

It should be mailed in plenty of time for your town or city clerk to mail you their own form and for you to return that form to them by 10 days before the election.

New Jersey

Updated: 03-28-2008

Registration Deadline — 21 days before the election.

6. ID Number. The last four digits of your Social Security number OR your New Jersey Driver's License number is required for voter registration. If you do not possess either of these identifications, please write "NONE" on the form. The State will assign a number that will serve to identify you for voter registration purposes.

State Instructions

7. Choice of Party. New Jersey's voter registration form does not provide a check-off for political party affiliation. A newly registered voter or voter who has never voted in a political party primary election can declare party affiliation at the polling place on the day of a primary election. In New Jersey, a primary election is only held for the Democratic and Republican parties. A voter may also file a political party declaration form to become a member of a political party. If a declared voter wished to change party affiliation he or she must file a declaration form 50 days before the primary election, in order to vote.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New Jersey you must:
- be a citizen of the United States
- be at least 18 years of age by the time of the next election
- be a resident of this State and county at your address at least 30 days before the next election
- not be serving a sentence or on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States

Mailing address:
New Jersey Department of Law and Public Safety
Division of Elections
PO BOX 304
Trenton, NJ 08625-0304

New Mexico

Updated: 03-01-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your full social security number is required. This registration card containing your social security number will become part of the permanent voter registration records of your locality, which are open to inspection by the public in the office of the county clerk. However, your social security number and date of birth will remain confidential and will not be disclosed to the public. Computerized listings of limited voter registration information (without social security number or birth date) are available to the general public, and are furnished upon request to incumbent election officeholders, candidates, political parties, courts and non-profit organizations promoting voter participation and registration, for political purposes only (§1-5-19B, NMSA 1978).
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New Mexico you must:
- be a citizen of the United States
- be a resident of the State of New Mexico
- be 18 years of age at the time of the next election
- not have been denied the right to vote by a court of law by reason of mental incapacity and, if I have been convicted of a felony, I have completed all conditions of probation or parole, served the entirety of a sentence or have been granted a pardon by the Governor.

Mailing address:
Bureau of Elections
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

New York

Updated: 03-01-2006

Registration Deadline — 25 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will be assigned to you by your State.
7. Choice of Party. You must enroll with a party if you want to vote in that party's primary election or caucus.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in New York you must:
- be a citizen of the United States
- be a resident of the county, or of the City of New York, at least 30 days before an election
- be 18 years old by December 31 of the year in which you file this form (*Note*: You must be 18 years old by the date of the general, primary, or other election in which you want to vote)
- not be in jail or on parole for a felony conviction
- not currently be judged incompetent by order of a court of competent judicial authority
- not claim the right to vote elsewhere

Mailing address:
NYS Board of Elections
40 Steuben Street
Albany, NY 12207-2108

State Instructions

North Carolina

Updated: 03-01-2006

Registration Deadline — Postmarked 25 days before the election or received in the elections office or designated voter registration agency site by 5:00 p.m. 25 days before the election.

6. ID Number. Provide your North Carolina driver's license number, or North Carolina Department of Motor Vehicles ID number. If you do not have a driver's license, then list the last four digits of your social security number.
7. Choice of Party. You must register with a party to vote in that party's primary unless that party allows unaffiliated voters to vote in its primary. If you indicate a political party that is not a qualified party, or indicate no party, you will be listed as "Unaffiliated".
8. Race or Ethnic Group. You are required to fill in this box. However, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in North Carolina you must:
• be a citizen of the United States
• be a resident of North Carolina and the county in which you live for at least 30 days prior to the election
• be 18 years of age by the day of the next general election
• have your rights of citizenship restored if you have been convicted of a felony
• not be registered or vote in any other county or state

Mailing address:
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

North Dakota

Updated: 03-01-2006

North Dakota does not have voter registration.

Ohio

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your social security number is requested. Providing this number is voluntary. This information allows the Board of Elections to verify your registration if necessary (O.R.C. 3503.14). [Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you don't have either number you will have to write "NONE" on the form and the State will assign you a number.]
7. Choice of Party. You do not register with a party if you want to take part in that party's primary election. Party affiliation is established by voting at a primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Ohio you must:
• be a citizen of the United States
• be a resident of Ohio
• be 18 years old on or before election day. If you will be 18 on or before the day of the general election, you may vote in the primary election for candidates only.
• not be convicted of a felony and currently incarcerated
• not be found incompetent by a court for purposes of voting

Mailing address:
Secretary of State of Ohio
Elections Division
180 E. Broad Street — 15th Floor
Columbus, OH 43215

Oklahoma

Updated: 10-29-2003

Registration Deadline — 25 days before the election.

6. ID Number. The last four digits of your social security number are required. (Oklahoma Title 26, Section 4-112) In addition, your Oklahoma driver's license number is requested.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oklahoma you must:
• be a citizen of the United States and a resident of the State of Oklahoma
• be 18 years old on or before the date of the next election
• have not been convicted of a felony, for which a period of time equal to the original sentence has not expired, or for which you have not been pardoned
• not now be under judgment as an incapacitated person, or a partially incapacitated person prohibited from registering to vote

Mailing address:
Oklahoma State Election Board
Box 528800
Oklahoma City, OK 73152-8800

State Instructions

Oregon

Updated: 03-01-2006

Registration Deadline — 21 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, you will need to write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oregon you must:
- be a citizen of the United States
- be a resident of Oregon
- be at least 18 years old by election day

Mailing address:
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722

Pennsylvania

Updated: 03-01-2006

Registration Deadline — 30 days before an election or primary.

6. ID Number. You must supply a Driver's License Number, if you have one. If you do not have a Driver's License Number, you must supply the last four digits of your social Security Number. If you do not have a Social Security Number, please write "NONE" in the box.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Pennsylvania you must:
- be a citizen of the United States at least one month before the next election
- be a resident of Pennsylvania and your election district at least 30 days before the election
- be at least 18 years of age on the day of the next election

Mailing address:
Office of the Secretary of the Commonwealth
210 North Office Bldg.
Harrisburg, PA 17120-0029

Rhode Island

Updated: 03-28-2008

Registration Deadline — 30 days before the election.

6. ID Number. The applicant shall be required to provide his/her Rhode Island driver's license number if the applicant has been issued a current and valid Rhode Island driver's license. In the case of an applicant who has not been issued a current and valid driver's license he/she must provide the last four (4) digits of his/her social security number. An applicant, who has neither, will be assigned a unique identifying number by the State of Rhode Island.
7. Choice of Party. In Rhode Island, a person must register with a party if he/she wishes to take part in that party's primary election. A person who fails to register with a party at the time of registration may, if he/she chooses, register with a party on the day of that party's primary and take part in that party's primary election. If a person does not register with a party, he/she can still vote in general elections and non-partisan primary elections.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Rhode Island you must:
- be a citizen of the United States
- be a resident of Rhode Island for 30 days preceding the next election
- be 18 years old by election day
- not be currently incarcerated in a correctional facility due to a felony conviction
- not have been lawfully judged to be mentally incompetent

Mailing address:
Rhode Island State Board of Elections
50 Branch Ave.
Providence, RI 02904-2790

South Carolina

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is required by the South Carolina Code of Laws and is used for internal purposes only. Social security number does not appear on any report produced by the State Election Commission nor is it released to any unauthorized

individual. (South Carolina Title 7-5-170)
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box. Your application may be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in South Carolina you must:
• be a citizen of the United States
• be at least 18 years old on or before the next election
• be a resident of South Carolina, your county and precinct
• not be confined in any public prison resulting from a conviction of a crime
• never have been convicted of a felony or offense against the election laws, or if previously convicted, have served your entire sentence, including probation or parole, or have received a pardon for the conviction
• not be under a court order declaring you mentally incompetent
• claim the address on the application as your only legal place of residence and claim no other place as your legal residence

Mailing address:
State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

South Dakota

Updated: 03-01-2006

Registration Deadline — Received 15 days before the election.

6. ID Number. Your driver's license number is requested. If you do not have a valid driver's license, you must provide the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in South Dakota you must:
• be a citizen of the United States
• reside in South Dakota
• be 18 years old by the next election
• not be currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penitentiary system
• not have been adjudged mentally incompetent by a court

Mailing address:
Elections, Secretary of State
500 E. Capitol
Pierre, SD 57501-5070

Tennessee

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. Social security number, if any, is required for purposes of identification and to avoid duplicate registration (TCA 2.2.116).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Optional.
9. Signature. To register in Tennessee you must:
• be a citizen of the United States
• be a resident of Tennessee
• be at least 18 years old on or before the next election
• not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)
• not be adjudicated incompetent by a court of competent jurisdiction (or have been restored to legal capacity)

Mailing address:
Coordinator of Elections
Tennessee Tower, Ninth Floor
312 Eighth Avenue, North
Nashville, TN 37243

Texas

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Texas you must:
• be a citizen of the United States

• be a resident of the county in which the application for registration is made
• be at least 17 years and 10 months old (you must be 18 to vote)
• not be finally convicted of a felony, or if a convicted felon, you must have fully discharged your punishment, including any incarceration, parole, supervision, period of probation or be pardoned.
• have not been declared mentally incompetent by final judgment of a court of law

Mailing address:
Office of the Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

Utah

Updated: 03-28-2008

Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk's office.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Declaring a party is not required in order to register to vote. However, Utah's election law allows each political party to choose whom it will allow to vote in its primary election. If you do not affiliate with a party, you may be restricted from voting in the primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Utah you must:
• be a citizen of the United States
• have resided in Utah for 30 days immediately before the next election
• be at least 18 years old on or before the next election
• not be a convicted felon currently incarcerated for commission of a felony
• not be convicted of treason or crime against the elective franchise, unless restored to civil rights
• not be found to be mentally incompetent by a court of law

Mailing address:
Office of the Lieutenant Governor
P.O. Box 142325
Salt Lake City, UT 84114

Vermont

Updated: 07-29-2008

Registration Deadline — Delivered to the town clerk before 5:00 PM on the Wednesday before the election.

6. ID Number. You must provide your Vermont Driver's license number, or if none, the last 4 digits of your Social Security number. If you do not have a Vermont Driver's license or a Social Security number, please write "NONE" on the form. The Secretary of State's office will assign you a unique identifying number.
7. Choice of Party. Vermont does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Vermont you must:
• be a citizen of the United States
• be a resident of Vermont
• be 18 years of age on or before election day
• have taken the following Oath: You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person [Voter's Oath, Vermont Constitution, Chapter II, Section 42]
By signing in Box 9, you are attesting that you have sworn or affirmed the Vermont voter's oath as printed above.

Mailing address:
Office of the Secretary of State
Director of Elections
26 Terrace Street
Montpelier, VT 05609-1101

Virginia

Updated: 11-30-2011

Registration Deadline — Delivered 22 days before the election.

6. ID Number. Your full social security number is required. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.

State Instructions

Article II, §2, Constitution of Virginia (1971).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Virginia you must:
• be a citizen of the United States
• be a resident of Virginia and of the precinct in which you want to vote
• be 18 years old by the next May or November general election
• not have been convicted of a felony, or have had your civil rights restored
• not currently be declared mentally incompetent by a court of law

Mailing address:
Virginia State Board of Elections
1100 Bank Street, 1st floor
Richmond, VA 23219

Washington

Updated: 9-24-2012

Registration Deadline — 29 days before the election (or delivered in-person to the local voter registration office until 8 days before the election).

6. ID Number. You must provide your Washington driver's license or state ID card number. If you do not have a Washington driver's license, or state ID card, you must provide the last four digits of your Social Security Number. Failure to provide this information may prevent your registration from being processed.
7. Choice of Party. You are not required to designate your party affiliation to register in Washington.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Washington you must:
• be a citizen of the United States
• be a legal resident of Washington State, your county and precinct for 30 days immediately preceding the election in which you want to vote
• be at least 18 years old by election day
• not be convicted of infamous crime, unless restored to civil rights

Mailing address:
Secretary of State
Elections Division
P.O. Box 40229
Olympia, WA 98504-0229

West Virginia

Updated: 09-12-2006

Registration Deadline — 21 days before the election.

6. ID Number. Enter your driver's license number. If you do not have a driver's license number, enter the last four numbers of your social security number. If you do not have a driver's license number or a social security number, an identification number will be assigned to you.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless you request the ballot of a party which allows independents to vote)
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in West Virginia you must:
• be a citizen of the United States
• live in West Virginia at the above address
• be 18 years old, or to vote in the primary be 17 years old and turning 18 before the general election
• not be under conviction, probation, or parole for a felony, treason or election bribery
• not have been judged "mentally incompetent" in a court of competent jurisdiction

Mailing address:
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

Wisconsin

Updated: 09-12-2006

Registration Deadline — Twenty (20) days before the election (or completed in the local voter registration office up to 5:00 pm. 1 day before the election, or completed at the polling place on election day).

6. ID Number. Provide your driver's license number, if you have no current and valid driver's license, the last 4 digits of your social security number or DOT-issued ID card number.
7. Choice of Party. Not required.
8. Race or Ethnic Group. Not required.
9. Signature. To register in Wisconsin you must:
• be a citizen of the United States
• be a resident of Wisconsin for at least 10 days
• be 18 years old
• not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored

State Instructions

- not have been found by a court to be incapable of understanding the objective of the electoral process
- not make or benefit from a bet or wage depending on the result of an election
- not have voted at any other location, if registering on election day

Mailing address:

State Elections Board
17 West Main Street, Suite 310
P.O. Box 2973
Madison, WI 53701-2973

Wyoming

Updated: 03-01-2006

Wyoming by law, cannot accept this form unless State law is changed.

ARIZONA VOTER REGISTRATION FORM
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA
LAS INSTRUCCIONES EN ESPAÑOL SE ENCUENTRAN AL REVERSO

Questions? For questions regarding voter registration, call your County Recorder listed on the back of the form

You Can Use This Form To:
- Register to vote in the state of Arizona
- Let us know that your name, address or party affiliation has changed

To Register To Vote In Arizona You Must (Qualifications):
- Be a **United States citizen** (see citizenship requirements on back)
- Be a **resident** of Arizona and the county listed on your registration
- Be **18 years** of age or more on or before the day of the next regular General Election

WARNING: Executing a false registration is a class 6 felony

You Cannot Register To Vote In Arizona If:
- You have been convicted of a felony and have not yet had your civil rights restored
- You have been adjudicated incompetent

How To Register To Vote:
- To be eligible for an election, you must register to vote at least 29 days before the election
- You can mail or hand deliver your completed form to your County Recorder's office
- If by mail, the form must be received by the County Recorder no later than 5 days after the last day to register to vote in that election or be postmarked 29 days or more before an election and received by the County Recorder by 7 p.m. on election day
- Your County Recorder's office will mail you a proof of registration within 4 – 6 weeks
- You can register online at www.azsos.gov

Citizens With Disabilities May:
- Contact the County Recorder/Elections Department for information about early voting, accessible voting, or other accommodations.

PROOF OF CITIZENSHIP REQUIREMENT

A complete voter registration form must contain proof of citizenship or the form will be rejected. If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, this will serve as proof of citizenship. If not, you must enclose proof of citizenship with the form. Please refer to the back of the form for a list of acceptable documents to establish your citizenship.

PERMANENT EARLY VOTING LIST
EARLY BALLOT – VOTE BY MAIL

Any voter may request to be included on the "Permanent Early Voting List" (PEVL) in order to automatically receive an early ballot for all elections he or she is eligible to participate. To be on the list, the address where you receive mail must be in Arizona. Military and overseas voters are also eligible to be on the PEVL using their overseas mailing address. To automatically receive an early ballot, mark "Yes" in box 1.

If "Yes" is marked in box 1, you will be added to the PEVL. If "no" is marked in box 1, your name will not be added to the PEVL and will be removed from PEVL if it was previously included on the list. If neither "Yes" or "No" are marked in box 1, your record will remain unchanged as it relates to being on the PEVL.

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*USE BLACK PEN – COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA – LLENE EL FORMULARIO COMPLETAMENTE

[1] Permanent Early Voting List – Early Ballot (see instructions above)
☐ YES, I want to automatically receive an early ballot for each election for which I am eligible.
☐ NO, I DO NOT want to automatically receive an early ballot. I understand CHECKING THIS BOX will remove my name from the list if it was previously included.

[ ] FOR OFFICIAL USE ONLY
S

[2] Last Name	First Name	Middle Name	Jr./Sr./III

[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.

[4] Apt./Unit/Space

[5] City	[6] Zip	[7] Address where you get your mail, if mail is not delivered to your home

[8] Last four digits of Social Security Number	[9] AZ Driver License Number or AZ Nonoperating License Number	[10] Optional Tribal Identification Number	[11] Alien Registration Number

[12] Birth Date (MM/DD/YYYY)	[13] State or Country of Birth	[14] Party Preference ☐ Republican ☐ Democratic ☐ Other _____	[15] Telephone Number	[16] Occupation

[17] If you were registered to vote in another state, list former address including county and state	[18] List former name (if applicable)	[19] Father's name or mother's maiden name

[20] Are you willing to work at a polling place on election day? ☐ Yes ☐ No

[21] E-mail address

[22] ● Are you a citizen of the United States of America? ☐ Yes ☐ No *If you checked "No" to either one of these questions, do not submit this form.*
● Will you be 18 years of age on or before election day? ☐ Yes ☐ No

VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

SIGN HERE _____ DATE _____

[24] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.

SIGNATURE OF PERSON ASSISTING _____ DATE _____

[23] If no street address draw a map here:

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<Remove tape and fold to mail — Remove tape and fold to mail>

ARIZONA VOTER REGISTRATION FORM (Translation)
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA

¿Preguntas? Para preguntas con respecto a la inscripción de votante, llame a su Registrador del Condado indicado al reverso del formulario

Usted puede usar este formulario para:

- Inscribirse para votar en Arizona
- Informarnos que su nombre, dirección o afiliación de partido ha cambiado

Para inscribirse para votar en Arizona, usted tiene que (Requisitos):

- Ser **ciudadano de los Estados Unidos** (vea los requisitos de la prueba de ciudadanía en el reverso)
- Ser **residente** de Arizona y del condado indicado on su inscripción
- Tener **18 años** de edad ó más en ó antes del día de la próxima Elección General normal

ADVERTENCIA: El ejecutar una inscripción falsa es un delito grave clase 6

Usted no puede inscribirse para votar en Arizona si:

- Usted ha sido condenado por un delito grave y todavía no se le han restituido sus derechos civiles
- Usted ha sido juzgado incompetente

Cómo inscribirse para votar:

- Para ser elegible para una elección, usted se debe registrar para votar por lo menos 29 días antes de la elección
- Usted puede enviar por correo su formulario llenado a la oficina de su Registrador del Condado o entregarlo personalmente
- Si se envía por correo, la forma debe ser recibida por el Registrador del Condado no más tarde de 5 días después del último día para registrarse para votar en esa elección ó contar con un sello postal fechado 29 días ó más antes de una elección y ser recibido por el Registrador del Condado antes de las 7 p.m. del día de la elección.
- La oficina del Registrador de su Condado le enviará un comprobante de registro dentro de 4 a 6 semanas
- Usted puede registrarse en línea en www.azsos.gov

Los ciudadanos con discapacidades pueden:

- Comunicarse con el Registrador del Condado/Departamento Electoral para información sobre la votación temprana o cualquier adaptación para votar

REQUERIMIENTO DE COMPROBANTE DE CIUDADANÍA

Una forma completa de registro electoral debe contener comprobante de ciudadanía o dicha forma será rechazada. Si usted tiene una licencia de manejo o identificación no operativa de Arizona emitida después del 1° de octubre de 1996, ésta servirá como comprobante de ciudadanía. De no ser así, usted deberá adjuntar a la forma un comprobante de ciudadanía. El reverso de la forma contiene una lista de los documentos que son aceptables para establecer su ciudadanía.

LISTA DE VOTACIÓN TEMPRANA PERMANENTE BOLETA ELECTORAL TEMPRANA – VOTO POR CORREO

Cualquier elector puede solicitar que se le incluya en la "Lista de Votación Temprana Permanente" (PEVL por sus siglas en inglés) para recibir automáticamente una boleta electoral temprana para todas las elecciones en las cuales sea elegible para participar. Para estar en la lista, el domicilio en el que usted recibe su correo debe estar en Arizona. Los electores en la milicia y en el extranjero también son elegibles para estar en la lista PEVL usando su domicilio postal en el extranjero. Para recibir automáticamente una boleta electoral temprana, marque "SI" en la casilla 1. Si se marca "SI" en la casilla 1, se le agregará a usted a la lista PEVL. Si se marca "No" en la casilla 1, su nombre no será agregado a la lista PEVL y se le removerá de la lista PEVL si previamente se le había incluido en dicha lista. Si no se marca ni "SI" ni "No" en la casilla 1, su registro permanecerá sin cambio con lo que respecta a estar en la lista PEVL.

ELECTION MAIL
OFFICIAL

<Línea para el doblez> ~ USE ESTA SECCIÓN COMO EJEMPLO. LLENE LA CARÁTULA DEL FORMULARIO ~ <Línea para el doblez>

[1] Lista de Votación Temprana Permanente - Boleta Electoral Temprana (vea las instrucciones arriba)
☐ Sí. Yo quiero recibir automáticamente una boleta electoral temprana para cada elección a la cual sea elegible.
☐ NO. NO DESEO recibir automáticamente una boleta electoral temprana. Yo entiendo que si MARCAR ESTA CASILLA, removeré mi nombre de la lista si éste estaba incluido previamente.
S

[2] Apellido	Nombre de Pila	Segundo Nombre	Jr./Sr./III

[3] Si donde usted vive no tiene domicilio, describa la ubicación de la residencia usando millaje, cruceros de calles, # de parcela, nombre de la subdivisión y lote, o detalles específicos de referencia. No use un apartado postal ni dirección de negocio. Dibuje un mapa abajo si está ubicado en una zona rural.

[4] Opto./ Unidad/ espacio

[5] Ciudad	[6] Código postal	[7] Dirección en la cual usted recibe su correspondencia, *si no se entrega la correspondencia a su casa*

[8] Las últimas cuatro cifras de su Número de Seguro Social	[9] Número de su licencia de manejar de AZ o número de su licencia de identificación no de manejar de AZ	[10] Número Opcional de Identificación Tribal	[11] Número de Registro de Extranjero

[12] Fecha de Nacimiento (MM/DD/AAAA)	[13] Estado o País de Nacimiento	[14] Especifique Su Partido Preferido ☐ Republicano/a ☐ Demócrata ☐ Otro/a _____	[15] Número de Teléfono	[16] Ocupación

[17] Si usted se registró para votar en otro domicilio, liste el domicilio previo incluyendo el condado y el estado	[18] Liste cualquier nombre previo (si es aplicable)	[19] Nombre de su padre o nombre de soltera de su madre

[20] ¿Está usted dispuesto/a a trabajar en un lugar de votación el día de la elección? SI☐ No☐	[21] Domicilio de correo electrónico

[21] ● ¿Es usted ciudadano de los Estados Unidos de América? SI☐ No☐
● ¿Cumplirá usted 18 años de edad en ó antes del día de la elección? SI☐ No☐
Si marcó "No" a cualquiera de estas preguntas, no presente el formulario.

DECLARACION DE VOTANTE – Al firmar abajo, juro o afirmo que la información más arriba es verdad, que soy RESIDENTE de Arizona, que NO soy un CRIMINAL convicto, o mis derechos civiles han sido restituidos y no se me ha juzgado INCOMPETENTE.

FIRME AQUÍ _____ FECHA

[23] Si usted no puede firmar el formulario, éste se puede llenar bajo su dirección. La persona que le ayudó tiene que firmar aquí.
FIRMA DE LA PERSONA QUE LE AYUDÓ _____ FECHA _____

[23] Si no hay una dirección de calle, dibuje un mapa aquí:
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O E
S

<DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO ——— DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO>

*USE BLACK PEN ~ COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA ~ LLENE EL FORMULARIO COMPLETAMENTE

[1] Permanent Early Voting List – Early Ballot (see instructions above)
☐ YES, I want to automatically receive an early ballot for each election for which I am eligible.
☐ NO, I DO NOT want to automatically receive an early ballot. I understand CHECKING THIS BOX will remove my name from the list if it was previously included.
S

[2] Last Name	First Name	Middle Name	Jr./Sr./III

[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.

[4] Apt./Unit/ Space

[5] City	[6] Zip	[7] Address where you get your mail, *if mail is not delivered to your home*

[8] Last four digits of Social Security Number	[9] AZ Driver License Number or AZ Nonoperating License Number	[10] Optional Tribal Identification Number	[11] Alien Registration Number

[12] Birth Date (MM/DD/YYYY)	[13] State or Country of Birth	[14] Party Preference ☐ Republican ☐ Democratic ☐ Other _____	[15] Telephone Number	[16] Occupation

[17] If you were registered to vote in another state, list former address including county and state	[18] List former name (if applicable)	[19] Father's name or mother's maiden name

[20] Are you willing to work at a polling place on election day? ☐ Yes ☐ No	[21] E-mail address

[22] ● Are you a citizen of the United States of America? ☐ Yes ☐ No
● Will you be 18 years of age on or before election day? ☐ Yes ☐ No

VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

SIGN HERE _____ DATE

[24] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.

SIGNATURE OF PERSON ASSISTING _____ DATE

[23] If no street address draw a map here:
N
W E
S

<Remove tape and fold to mail ——— Remove tape and fold to mail>

VOTER REGISTRATION FORM – FORMULARIO DE INSCRIPCIÓN DE VOTANTE

VOTER REGISTRATION INFORMATION

If you meet the qualifications listed on the front of this form, complete, sign and return the attached registration form to the County Recorder for your county listed below. The form may be mailed or returned to a person designated to receive voter registration forms. Call your County Recorder for more information.

PROOF OF CITIZENSHIP REQUIREMENTS

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form also must include proof of citizenship or the form will be rejected. If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, write the number in box 9 on the front of this form. This will serve as proof of citizenship and no additional documents are needed. If not, you must include proof of citizenship with the form. Only one form of proof is needed to register to vote.

The following is a list of acceptable documents to establish your citizenship:

- A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your current legal name
- A legible photocopy of the pertinent pages of your passport
- Presentation to the County Recorder of U.S. naturalization documents or fill in your Alien Registration Number in box 11
- Your Indian Census Number, Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal Enrollment Number in box 10
- A legible photocopy of your Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.

If you need to include a photocopy of proof of citizenship, please fold the proof along with the voter registration form and place both items in an envelope and mail them to your County Recorder listed below. Do not send original documents. Photocopies will not be returned to you. Please visit www.azsos.gov if you have any questions regarding acceptable types of proof of citizenship.

If you are registered in Arizona and use this registration form because you moved within a county, changed your name, or changed your political party affiliation, you do not need to provide photocopies of proof of citizenship. If you move to a different Arizona county, you will need to provide proof of citizenship.

ACCOMMODATIONS FOR INDIVIDUALS WITH DISABILITIES

Alternative format materials, sign language interpretation, and assistive listening devices are available upon 72 hours advance notice to your County Recorder. To the extent possible, additional reasonable accommodations will be made available within the time constraints of the request.

GENERAL INFORMATION

1. **You must re-register whenever you move, change your name, or change your political party affiliation.**
2. Early ballots may be requested from the County Recorder of your county of residence.
3. Keep this copy as your receipt. After the County Recorder receives your registration and places it in the county general register, a notice will be sent to you within 4 – 6 weeks indicating that your name appears on the register. If you do not receive your notice contact your County Recorder.
4. Fill in your political party preference in box 14. If you leave this box blank as a first time registrant in your county, your party preference will be "Party Not Designated". If you leave this box blank and you are already registered in the county, your current party preference will be retained. Please write full name of party preference in box.
5. Your decision to register to vote or not, and where you submitted your registration, will remain confidential.

INFORMACIÓN PARA LA INSCRIPCIÓN DE VOTANTE

Si usted satisface los requisitos indicados en la carátula de este formulario, llene, firme y regrese la forma adjunta de registro al Registrador del Condado de su condado listado abajo. La forma puede enviarse por correo o regresarse a una persona designada para recibir formas de registro electoral. Llame al Registrador de su Condado para más información.

REQUERIMIENTO DE COMPROBANTE DE CIUDADANÍA

Si esta es su primera vez inscribiéndose para votar en Arizona, o si se ha mudado a otro condado en Arizona, su formulario de inscripción de votante también debe incluir prueba de ciudadanía o se rechazará el formulario. Si usted tiene una licencia de manejar de Arizona, o una licencia de identificación no de manejar de Arizona, expedida después del 1° de octubre de 1996, escriba el número en la casilla 9 en la carátula de este formulario. Esto servirá como prueba de ciudadanía y no se necesitan ningunos otros documentos. Si no, usted debe incluir prueba de ciudadanía con la forma. Sólo se necesita una forma de comprobación para registrarse para votar.

Lo siguiente es una lista de los documentos aceptables para establecer su ciudadanía.

- Una fotocopia legible de un acta de nacimiento que verifique la ciudadanía y la documentación legal acreditativa (ej. acta de matrimonio) si el nombre en el acta de nacimiento no es igual a su nombre legal actual
- Una fotocopia legible de las páginas pertinentes de su pasaporte
- Presentación al Registrador del Condado de documentos de naturalización de los Estados Unidos o anote su Número de Registro de Extranjero en la casilla 11
- Su Número de Tarjeta de la Oficina de Asuntos de Nativo Americanos, Número de Tarjeta de Tratado Tribal, o Número de Matrícula Tribal en la casilla 10
- Una fotocopia legible de su Certificado Tribal de Sangre Nativo Americana o affidávit de Nacimiento de la Oficina de Asuntos de Nativo Americanos.

Si usted necesita incluir una fotocopia de prueba de ciudadanía, por favor doble la prueba junto con la forma de registro electoral, coloque ambos artículos en un sobre, y envíelos a su Registrador del Condado listado abajo. No envíe documentos originales. Las fotocopias no se le regresarán. Por favor visite www.azsos.gov si tiene usted cualquier pregunta relacionada con los comprobantes aceptables de la ciudadanía.

Si usted está registrado en Arizona y usa el formulario de registro debido a que se mudó dentro de un condado, cambió su nombre, o cambió su afiliación de partido político, no necesita proveer fotocopias de su comprobación de ciudadanía. Si usted se mude a un condado distinto en Arizona, necesitará proveer prueba de ciudadanía.

ACOMODACIONES PARA INDIVIDUOS CON DISCAPACIDADES

Los materiales en formatos alternos, interpretación a señas y dispositivos de audición asistida están disponibles al dar aviso previo de 72 horas a su Registrador del Condado. Al grado que sea posible, se pondrán a la disposición más acomodamientos razonables dentro de las limitaciones de tiempo de la solicitud.

INFORMACIÓN GENERAL

1. **Usted debe volver a registrarse cuando se mude, cambie su nombre, o cambie de afiliación de partido político.**
2. Se pueden solicitar boletas electorales tempranas del Registrador del Condado del condado de su residencia.
3. Conserve esta copia como su recibo. Después de que el Registrador del Condado reciba su inscripción y la anote en el registro general del condado, se le enviará un aviso dentro de 4 a 6 semanas que indica que su nombre aparece en el registro. Si usted no recibe su aviso, póngase en contacto con su Registrador del Condado.
4. Anote su preferencia de partido político en la casilla 14. Si usted deja esta casilla en blanco al registrarse por primera vez en su condado, su preferencia de partido será "No Designó Partido". Si usted deja esta casilla en blanco y ya se registró en el condado, se retendrá su preferencia actual de partido. Por favor anote el nombre completo del partido político de su preferencia en la casilla.
5. Su decisión de inscribirse para votar o no, y dónde presentó su inscripción, será confidencial.

Apache County Recorder
St. Johns, AZ 85936
(928) 337-7516 (TDD# 337-4402)

Cochise County Recorder
Bisbee, AZ 85603
(520) 432-8354 (TDD# 432-8360)

Coconino County Recorder
Flagstaff, AZ 86001
(928) 679-7880 (TDD# 679-7131)

Gila County Recorder
Globe, AZ 85501
(928) 425-3231 (TDD# 425-0639)

Graham County Recorder
Safford, AZ 85548
(928) 428-3580 (TDD# 428-3562)

Greenlee County Recorder
Clifton, AZ 85533
(928) 865-2632 (TDD# 865-2632)

La Paz County Recorder
Parker, AZ 85344
(928) 669-6136 (TDD# 669-6400)

Maricopa County Recorder
Phoenix, AZ 85003
(602) 506-1511 (TDD# 506-2348)

Mohave County Recorder
Kingman, AZ 86402
(928) 753-0767 (TDD# 753-0769)

Navajo County Recorder
Holbrook, AZ 86025
(928) 524-4182 (TDD# 524-4294)

Pima County Recorder
Tucson, AZ 85702
(520) 740-4330 (TDD# 740-4320)

Pinal County Recorder
Florence, AZ 85132
(520) 509-3555 (TDD# 866-6851)

Santa Cruz County Recorder
Nogales, AZ 85621
(520) 375-7990 (TDD# 761-7816)

Yavapai County Recorder
Prescott, AZ 86305
(928) 771-3248 (TDD# 771-3530)

Yuma County Recorder
Yuma, AZ 85364
(928) 373-6034 (TDD# 373-6033)

State of Arizona
Secretary of State
Rev. 07/20/2011

RESPONDENT'S BRIEF

No. 12-71

JAN 14 2013

CLERK

In The

Supreme Court of the United States

STATE OF ARIZONA, et al.,
Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, INC., et al., and JESUS M. GONZALEZ, et al.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS INTER TRIBAL COUNCIL OF ARIZONA, INC., LEAGUE OF WOMEN VOTERS OF ARIZONA, ARIZONA ADVOCACY NETWORK, STEVE M. GALLARDO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, AND HOPI TRIBE

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(202) 434-2064

CORPORATE DISCLOSURE STATEMENT

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; and League of Women Voters of Arizona are nongovernmental corporations. They have no parent organizations and no stock.

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INTRODUCTION

The Elections Clause of the Constitution (Art. I, sec. 4, cl. 1) grants Congress plenary authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." In 1993, Congress concluded that action was necessary to address a national problem regarding a complicated and restrictive maze of State voter registration laws for Federal elections, and so enacted the National Voter Registration Act ("NVRA"). 42 U.S.C. § 1973gg *et seq*. Congress' object was to reduce the obstacles to voter registration to a minimum, while protecting the integrity of the election process.

The NVRA establishes, *inter alia*, a mail-in system of voter registration for Federal elections. The NVRA charges a Federal agency, the United States Election Assistance Commission ("EAC"), with the responsibility to "develop" a uniform, national mail-in registration form ("Federal Form" or "Form"). 42 U.S.C. § 1973gg-7(a)(2). The EAC is to undertake this task "in consultation with" the States, *id.*, but the States may not alter the Form once prescribed. With regard to verification of voting eligibility, the NVRA provides that Federal Form applicants must attest, under oath, to their voting qualifications, including U.S. citizenship. The NVRA further requires the States to "accept and use" the EAC-prescribed Form. 42 U.S.C. § 1973gg-4(a)(1).

This case concerns an Arizona law, adopted in 2004, which requires election officials to "reject" all voter registration applications, including Federal

Forms, not accompanied by the newly-defined "satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). The State-mandated "evidence" is more than that required by the Federal Form. Applicants who do not comply with this procedure must file an entirely new registration application, providing the "satisfactory evidence," before they are registered to vote. Arizona asked the EAC to revise the Federal Form (for use in the State) to incorporate the new procedure. The EAC declined. Arizona, however, continued to routinely reject fully-completed Federal Forms which did not satisfy the State's supplemental verification provision.

The Arizona law, insofar as it is applied to Federal Form applicants, conflicts with the NVRA and, under this Court's Elections Clause jurisprudence, is void to that extent. Neither Arizona nor the other States may unilaterally supplement the Federal Form requirements established by the EAC by refusing to "accept and use" the EAC-prescribed Form. Arizona, however, seeks to do precisely that. This conduct, if allowed, would substantially eviscerate the mail-in registration system established by Congress since that system, in significant part, relies upon the establishment and use of a national, uniform registration form.

STATEMENT OF THE CASE

I. The National Voter Registration Act Of 1993, And The Help America Vote Act Of 2002

A. Overview of the NVRA

Congress enacted the NVRA to "establish procedures to increase the number of eligible citizens who register to vote," while "ensur[ing] that accurate and current voter registration rolls are maintained" and "protect[ing] the integrity of the electoral process." 42 U.S.C. § 1973gg(b). The NVRA expands the methods by which persons may register to vote in Federal elections, and also specifies procedures to ensure that citizens have full access to the new registration methods. In particular, the NVRA mandates three registration methods – registration by mail, registration through motor vehicle offices, and registration at other governmental offices (including public assistance and disability offices), 42 U.S.C. § 1973gg-2(a) – and provides specific procedures for implementation of each of these registration methods.[1] 42 U.S.C. §§ 1973gg-3 to -5.

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[1] Congress exempted from NVRA coverage certain States that do not employ a voter registration system or that allow so-called "same-day" voter registration when individuals appear to vote at an election. 42 U.S.C. § 1973gg-2(b). As a result, the NVRA does not apply to six States: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. U.S. Dept. of Justice, The National Voter Registration Act of 1993 (NVRA), http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php (last visited Jan. 11, 2013).

Congress premised the NVRA on three findings: first, "the right of citizens of the United States to vote is a fundamental right"; second, governments at all levels have "the duty . . . to promote the exercise of that right"; and, third, "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a).[2] With regard to the latter of these findings, Congress explained that it sought to remedy the "complicated maze of local [registration] laws and procedures, in some cases as restrictive as the . . . practices [outlawed by the Voting Rights Act] . . . to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3 (1993),

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[2] The district court below found that American Indians have suffered from a history of discrimination in voting in Arizona, citing the State's denial of the right to vote to American Indian citizens between 1924 and 1948, the State's use of a literacy test from 1909 until it was banned by the Voting Rights Act Amendments of 1970, and the State's use of English-only elections until Arizona was covered by the language minority provisions of the Voting Rights Act. App. 316-317. *See Porter v. Hall*, 34 Ariz. 308, 271 P. 411, 419 (1928) (holding American Indians residing on reservations are "not entitled to vote"), *overruled by Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). *See also Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) (county supervisorial districts discriminated against Navajo citizens); *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (state redistricting plan intentionally discriminated against Navajo Nation).

reprinted in 1993 U.S.C.C.A.N. 105, 106-07 ("House Rep.").[3]

B. The National Mail-In Registration System

The integral components of the NVRA's mail-in registration system, as subsequently modified by the Help America Vote Act of 2002 ("HAVA"), include a national and uniform voter registration application prescribed by a Federal agency, 42 U.S.C. § 1973gg-7(a)(2), and the requirement that States "accept and use the mail voter registration form prescribed by the [agency]." 42 U.S.C. § 1973gg-4(a)(1).[4] In addition, States must "make [Federal Forms] available for distribution through governmental and private entities, with particular emphasis on making them

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[3] Previously, in 1975, Congress amended the Voting Rights Act to establish a permanent, nationwide ban on certain enumerated discriminatory "tests and devices" for conducting voter registration for Federal, State, and local elections. 42 U.S.C. § 1973aa.

[4] Congress explained the utility of the new national, uniform form as follows:

> The requirements that States use a uniform mail registration application form serves to augment the extensive outreach features of the "motor-voter" and agency-based registration procedures. Uniform mail forms will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events.

House Rep. at 10, 1993 U.S.C.C.A.N. at 114; S. Rep. No. 103-6, at 26 (1993) (same).

available for organized voter registration programs." 42 U.S.C. § 1973gg-4(b).[5]

Congress adopted several measures to ensure that the new voter registration Form is (1) national and uniform, (2) harmonized with the pre-existing system whereby each State and the District of Columbia has its own voter registration form, and (3) simple and easy to use while allowing only eligible persons to register to vote.

First, to ensure that the Federal Form is national and uniform, the NVRA includes two complementary requirements. The statute delegates exclusive authority to "develop" the Federal Form to a Federal agency, acting pursuant to the content guidelines specified by Congress. 42 U.S.C. § 1973gg-7(a)(2) & (b). Specifically, the NVRA provides that: "The Election Assistance Commission – . . . shall develop a mail voter registration application form for elections for Federal office." *Id.*[6] In addition, the

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[5] The NVRA similarly mandates procedures for citizen access to the other two new registration methods. This includes the requirement that applications for a driver's license "serve as an application for voter registration . . . unless the applicant fails to sign the voter registration application," 42 U.S.C. § 1973gg-3(a)(1), and the requirement that the Federal Form or a State "equivalent" form be used for voter registration at other State and local offices where registration for Federal elections is required. 42 U.S.C. § 1973gg-5(a)(6).

[6] The NVRA originally granted this authority to the Federal Election Commission. Pub. L. No. 103-31, § 9, 107 Stat. 77, 87 (1993). In 2002, HAVA transferred this authority to a new agency created by that statute, the United States Election Assistance Commission. Pub. L. No. 107-252, § 802(b), 116 Stat. 1666, 1726, *amending* 42 U.S.C. § 1973gg-7(a).

NVRA mandates that States "shall *accept and use* the mail voter registration application form *prescribed by the [EAC]* . . . for registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added).[7]

Second, to ensure coordination with the States, the NVRA gives States a voice in the process by which the Federal Form is developed, but not control over the Federal Form or authority to supplement the Federal Form requirements. The NVRA specifies that, in "develop[ing] a mail voter registration application form," the EAC shall act "in consultation with the chief election officers of the States." 42 U.S.C. § 1973gg-7(a). The NVRA also authorizes States to "develop and use [their own] mail voter registration form . . . for the registration of voters in elections for Federal office," subject to two conditions: States may use their own form only "[i]n addition to accepting and using" the Federal Form; and the State form must "meet[] all of the [content] criteria" the NVRA specifies for the Federal Form. 42 U.S.C. § 1973gg-4(a)(2).

Third, to ensure that the Federal Form is simple and easy to use, and to ensure that only eligible persons register to vote, the NVRA provides both general and specific directions to the EAC with regard to its development of the Form. The general directions are as follows:

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[7] 42 U.S.C. § 1973gg-4 and § 1973gg-7 are quoted in full in the Addendum to this brief, at 1a-4a.

> The mail voter registration form developed [by the EAC] – (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

The specific content-directions address the manner in which Federal Form applicants verify their qualifications to vote. The NVRA provides that the Form "shall include a statement that – (A) specifies each eligibility requirement (including citizenship); (B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2). The NVRA further provides that the Federal Form "may not include any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3).

Subsequently, in HAVA, Congress also required that the Federal Form include the questions, "'Are you a citizen of the United States of America?'" and "'Will you be 18 years of age on or before election day?'," along with "[t]he statement 'If you checked "no" in response to either of these questions, do not complete this form.'" 42 U.S.C. §

15483(b)(4)(A).[8] HAVA provides that if an applicant fails to answer the citizenship question, "the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)." 42 U.S.C. § 15483(b)(4)(B).[9]

In sum, the NVRA and HAVA address the manner of conducting elections for Federal office insofar as use of the Federal Form for voter registration is concerned. In so doing, the statutes specifically recognize the States' universal requirement of United States citizenship as a

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[8] 42 U.S.C. § 15483(b)(4) also is quoted in the Addendum, at 4a-6a.

[9] HAVA provides an additional content requirement for registration applications for Federal elections, which applies to both the Federal Form and State registration forms, which is that applicants are to provide their driver's license number or the last four digits of their social security number, if available, or in certain States their full social security number, if available. 42 U.S.C. § 15483(a)(5). Also, HAVA specifies that individuals who register by mail, and who are registering for the first time in a State, must provide certain identification at the time of voting to verify their identity and, in the alternative, may provide this verification with their mail-in registration application. 42 U.S.C. § 15483(b)(1)-(3). The NVRA includes detailed provisions relating to the administration of voter registration lists for Federal elections, 42 U.S.C. § 1973gg-6, and HAVA requires States to implement computerized statewide lists of registered voters for Federal elections. 42 U.S.C. § 15483(a).

qualification for voting, while not prescribing the qualifications for voting in Federal elections.[10]

C. The Federal Form Prescribed by the EAC

The EAC has defined by regulation the requirements for applicants to successfully complete the Federal Form in order to register to vote. 11 C.F.R. § 9428.4.[11] The current version of the Federal Form is included in an appendix to the Ninth Circuit's *en banc* decision, Pet. App. 63c-64c, and is available on the EAC's website.[12]

The EAC regulations identify all items of information that an applicant may need to provide in order to register using the Federal Form. 11 C.F.R. § 9428.4(a). Consistent with the NVRA and HAVA, this does not include any requirement that individuals provide any evidence of their qualifications to vote beyond their attestation of eligibility, under penalty of perjury. *Id.* Specifically,

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[10] The NVRA further provides for criminal penalties for "knowingly and willfully" submitting a registration application that is "false, fictitious, or fraudulent under the laws of the State in which the election is held." 42 U.S.C. § 1973gg-10(2).

[11] The EAC regulations regarding the Federal Form are quoted in full in the Addendum to this brief, at 6a-11a.

[12] http://www.eac.gov (follow "National Voter Registration Act" hyperlink, then follow "National Mail Voter Registration Form"). In addition to English, the EAC makes the Form available in Spanish, Chinese, Japanese, Korean, Tagalog and Vietnamese. *Id.*

the EAC regulations address verification of voting eligibility as follows:

> The form shall . . . :
>
> (1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompany[ing] state instructions; (2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements.

11 C.F.R. § 9428.4(b).

The EAC regulations further identify three narrowly-defined items of applicant information which may vary by the applicant's State of residence. These are: the "[v]oter identification number"[13]; the voter's "[p]olitical party preference, for an applicant in a closed primary state"; and the voter's "[r]ace/ethnicity, if applicable for the applicant's state of residence." 11 C.F.R. § 9428.4(a)(6-8). To accommodate these variations, the regulations provide that the EAC shall incorporate State-specific instructions in the Federal Form to explain these

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[13] *See supra* note 9.

registration requirements. 11 C.F.R. § 9428.3(b); 11 C.F.R. § 9428.4(a). The State-specific instructions also serve to identify the voting eligibility requirements of each State. 11 C.F.R. § 9428.3(b). The EAC regulations do not allow for any variance in the procedures by which applicants verify their voting eligibility, and thus the State-specific instructions do not include any directions regarding such verification. 11 C.F.R. § 9428.4.[14] The EAC regulations also specify that the Form is to include general instructions, as well. 11 C.F.R. § 9428.3(a).

The Federal Form follows the format specified in the EAC's regulations. 11 C.F.R. § 9428.5. The Form has a postcard format with four sections that fold together, including a front section for the address and stamp, two sections for entry of information by the applicant, and one section reserved for potential use by registration officials. Pet. App. 63c-64c. The principal section for applicant-entry begins by asking whether the applicant is a citizen, and whether the applicant will be 18 years old on or before election day, and instructs persons who check "no" to either or both of these questions to not complete the Form. This section also provides for such information as name, address, and date of birth, and includes a place for the applicant to sign the Form to attest,

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[14] Consistent with these provisions, the regulations also require that States promptly inform the EAC of any change in their requirements concerning voting eligibility, voter identification number, statement of party preference, and statement of race/ethnicity, but do not require that States provide any information concerning verification of voting eligibility. 11 C.F.R. § 9428.6.

under penalty of perjury, to the accuracy of the information provided and to the individual's voting eligibility (including U.S. citizenship). The second applicant-entry section includes space for the applicant to potentially address several specialized circumstances (*e.g.*, a prior registration address).

The Federal Form includes general instructions, Pet. App. 61c-62c, and State-specific instructions, Pet. App. 67c-84c, prepared by the EAC. The general instructions walk applicants through the information to be provided on the Form that does not vary by State. The general instructions include, with regard to U.S. citizenship, an instruction that only individuals who are U.S. citizens may use the Form, Pet. App. 61c, an instruction to answer the questions at the top of the application with regard to U.S. citizenship and age-eligibility before filling out the form, Pet. App. 62c, and an instruction that applicants should make sure they meet their State's qualifications to vote before signing the Form. *Id.* The State-specific instructions for Arizona provide information about applicants entering an identification number and a choice of a political party, and specify that applicants should not provide race/ethnicity information. These instructions also identify the State's deadline for registering for an election, the State's qualifications for voting, and the mailing address for the Arizona Secretary of State. Pet. App. 67c-68c. Neither the general instructions nor the Arizona-specific instructions make any reference to the "evidence of citizenship" procedure Arizona enacted by Proposition 200.

II. Arizona's Supplemental Verification Of Citizenship Requirement

A. Arizona's Change in Procedures for Voter Registration Applicants to Verify U.S. Citizenship

In November 2004, Arizona voters amended the state election code by adopting Proposition 200, one portion of which added a new procedure by which voter registration applicants are to verify that they meet Arizona's pre-existing qualification of United States citizenship. Prior to the adoption of Proposition 200, applicants verified their citizenship (and compliance with Arizona's other voting qualifications) by signing the Federal Form, or by signing the State registration form which likewise required that applicants attest that the information provided was accurate, subject to potential felony prosecution for making a false statement. App. 165, 249.

Proposition 200 requires that applicants, in addition to attestation, verify their eligibility to vote by submitting "satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Under Proposition 200, county election officials must "reject any application for registration that is not accompanied by [the required evidence of citizenship]." *Id.* Proposition 200 generally "grandfathered-in" all Arizona residents who were registered to vote on the law's effective date, *i.e.*, these individuals were "deemed to have provided satisfactory evidence of citizenship" by having complied with the former attestation procedure, and

were not required to comply with the new procedure. Ariz. Rev. Stat. § 16-166(G).[15]

Prior to the district court's entry of an injunction in these cases on August 15, 2012 (pursuant to the Ninth Circuit mandate), App. 381-84, Arizona required that applicants completing the Federal Form comply with Proposition 200's supplemental verification procedure. This meant that, if an applicant submitted the Federal Form without "satisfactory evidence" of citizenship, county election officials rejected the Form entirely, and the applicant was required to submit a new application, with the requisite evidence, in order to register to vote. App. 251 ("the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship").

The particular type of evidence required by Proposition 200 varies depending on the circumstances of individual citizens. Individuals possessing a driver's license or state identification card which "indicates . . . that the person has provided satisfactory proof of United States citizenship" (which includes those issued in Arizona after October 1, 2006) may comply by entering their

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[15] However, individuals registered on Proposition 200's effective date who subsequently "chang[e] voter registration from one county to another," Ariz. Rev. Stat. § 16-166(G), must comply with the new "evidence of citizenship" procedure. Ariz. Rev. Stat. § 16-166(F) & (G) are quoted in the Addendum, at 13a-14a.

license or identification card number on the application. Ariz. Rev. Stat. § 16-166(F)(1).

Proposition 200 states that applicants who are members of an Indian tribe may provide a "bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number." Ariz. Rev. Stat. § 16-166(F)(6). However, Bureau of Indian Affairs cards and tribal treaty cards are not in use in Arizona. App. 260. Moreover, the Havasupai Tribe and Navajo Nation do not issue tribal enrollment cards, and cards issued by the Hopi Tribe, Yavapai-Apache Nation, and Tonto Apache Tribe do not include enrollment numbers. *Id.*[16]

Applicants who are unable to satisfy the "evidence of citizenship" requirement by the preceding means must furnish documentation of citizenship, such as a copy of their birth certificate, a copy of their passport, or their naturalization documents, together with the voter registration application. Ariz. Rev. Stat. § 16-166(F)(2)-(5). Proposition 200 provides no exception for indigency or for reimbursement of costs incurred in obtaining the requisite documentation.[17]

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[16] Tribal enrollment cards are free for most tribes, but for the Hopi Tribe, the first card is free and an additional card is $15; for the Yavapai-Apache Nation, a card costs $5; and for the Colorado River Indian Tribe, the first card is free and an additional card is $12. App. 260.

[17] The district court below found that, after Proposition 200 became effective on January 25, 2005, App. 248, and until September 2007, the new "evidence of citizenship" requirement resulted in the rejection of 31,550 registration applications (in the 14 of Arizona's 15 counties reporting data); this number

Proposition 200 did not alter the qualifications for voting in Arizona, which are specified by Article VII, section 2(A) of the Arizona Constitution (entitled "Qualifications of voters; disqualification"). In particular, the Arizona Constitution provides that each voter must "be a citizen of the United States."[18] This requirement has been part of the Arizona Constitution since Arizona gained statehood on February 14, 1912.[19]

Arizona does not require that registration applicants provide verification of compliance with the State's other voting qualifications beyond the attestation of eligibility under penalty of prosecution. Thus, the State does not require any documentation that applicants are 18 or older, or that those

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excluded forms where the applicant answered "no" to the U.S. citizenship question. App. 263. Only approximately 30% of the 31,550 applicants went on to successfully register as of the time of trial, in July 2008. App. 264.

[18] Article VII, section 2 is quoted in the Addendum, at 12a. In addition to U.S. citizenship, voters also must be at least 18 years old and satisfy any statutory durational residency requirement, may not be "adjudicated [as] incapacitated," and may not be "convicted of treason or felony, . . . unless restored to civil rights." The citizenship requirement, and the other qualifications set forth in Article VII, section 2 are repeated in the Arizona Elections and Electors Code, Ariz. Rev. Stat. § 16-101 (that section also defines what it means to be a resident of Arizona, provides for a general durational residency requirement of 29 days preceding an election, and specifies that a voter must be "able to write his name or make his mark, unless prevented from so doing by physical disability").

[19] Ariz. Const. art. VII, § 2 (1910) *available at* http://azmemory.azlibrary.gov/cdm/compoundobject/collection/archgov/id/218/rec/4, at p. 27.

individuals who were disqualified from voting because of a felony conviction have had their civil rights restored.[20]

The "Findings and declaration" section of Proposition 200[21] states that the initiative was placed on the ballot in 2004 as part of the ongoing debate in Arizona regarding the issue of persons residing in the State "who do not have a lawful right to be in this country." *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).[22] The ballot pamphlet prepared by the Secretary of State included arguments submitted by various individuals and organizations in support of and in opposition to the initiative.[23]

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[20] Arizona Secretary of State, Voter Registration and Education, http://www.azsos.gov/election/VoterRegistration.htm #How (last visited Jan. 11, 2013) (includes link to Arizona State registration form).

[21] Arizona Secretary of State, 2004 Ballot Propositions—Proposition 200, *available at* http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm.

[22] That case dealt with a statute enacted by the Arizona Legislature in 2010 which sought to directly regulate immigration policy. The Court held that the law was preempted, in significant part, by Federal immigration law. 132 S. Ct. at 2510. The 2010 law did not deal with any issue relating to the regulation of elections for Federal office in Arizona.

[23] Proposition 200, *supra* note 20.

B. Arizona's Request That the EAC Incorporate the State's "Evidence of Citizenship" Procedure into the Federal Form

On December 12, 2005, over a year after Proposition 200 was passed and in response to an inquiry from the EAC, the Arizona Secretary of State sent an e-mail to the EAC asking the agency to alter the Federal Form, insofar as it is used in Arizona, to incorporate the State's new procedure. App. 181. On March 6, 2006, the EAC responded, in a multi-page letter written by its Executive Director, denying the Secretary's request and explaining the basis for the denial. App. 181-87. The EAC stated its conclusion as follows: "While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form." App. 187. The Arizona Secretary of State then wrote two letters to the EAC asking that this decision be reconsidered, App. 188-89 & 216-20, but the EAC declined. App. 225.

Despite the EAC's determination, Arizona employed the Proposition 200 verification procedure for individuals completing a Federal Form both before and after its request to the EAC. Arizona did not challenge, under the Administrative Procedure Act, 5 U.S.C. § 702, the EAC's determination not to alter the Federal Form.

III. Other States' Voter Registration Procedures For Verifying U.S. Citizenship

In addition to Arizona, three States recently have adopted "evidence of citizenship" procedures for registering to vote which go beyond the attestation procedure set forth by Congress for the Federal Form – Alabama (2011), Georgia (2009), and Kansas (2011). Brief of Alabama, Georgia, Kansas, Michigan, Oklahoma, and Texas as Amici Curiae Supporting Petitioners, at 20.[24] Arizona, however, is the only State which conducted the 2012 general election using the supplemental procedure.[25]

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[24] This *amicus* brief incorrectly advises that Tennessee also recently adopted such a provision. The Tennessee procedure does not govern the information that registration applicants must provide, and instead requires that the state coordinator of elections review the State registration list to identify individuals who are registered to vote and who potentially may not be U.S. citizens. Tenn. Code Ann. § 2-2-141.

[25] Neither Alabama nor Georgia has implemented its "evidence of citizenship" procedure. *See* State of Alabama Mail-in Voter Registration Form, *available at* http://www.sos.state.al.us/downloads/election/vr/nvra-2.pdf (does not mention the statutory "evidence of citizenship" procedure) (last visited Jan. 11, 2013); State of Georgia Application for Voter Registration, *available at* http://sos.georgia.gov/elections/voter_registration/GA%20VOTER%20REGISTRATION%20%20APP%28Fill_2007%29.pdf (likewise makes no mention of the applicant satisfying the statutory "evidence of citizenship" procedure) (last visited Jan. 11, 2013). (The Georgia procedure was administratively precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, but the Alabama provision apparently has not. Br. of Ala. *et al.* at 20, n.10.) The Kansas provision did not become effective until January 1, 2013. Kan. Stat. Ann. § 25-2309(u).

Accordingly, the vast majority of the States to which the NVRA applies, and the District of Columbia, rely on the attestation procedure Congress set forth in the NVRA and HAVA for individuals to verify their U.S. citizenship (and their compliance with other voting eligibility requirements).

PROCEDURAL HISTORY

In May 2006, two groups of plaintiffs filed suit in the U.S. District Court for the District of Arizona challenging, *inter alia*, Arizona's refusal to "accept and use" the Federal Form, in violation of the NVRA, 42 U.S.C. § 1973gg-4(a). *ITCA, et al. v. Brewer*, no. 2:06-cv-1362, Complaint at ¶¶ 81-83 (May 24, 2006) (Docket 1); *Gonzalez, et al. v. Arizona, et al.*, no. 2:06-cv-1268, Complaint at ¶¶ 101-03 (May 9, 2006) (Docket 1). The cases were immediately consolidated by the district court.

The *ITCA* group includes: American Indian citizens represented by the Inter Tribal Council of Arizona, Inc. (a nonprofit corporation which advocates on behalf of its 20-member Indian Tribes) and the Hopi Tribe; three nonpartisan advocacy groups which seek to increase citizen participation in Arizona's electoral process (the League of Women Voters of Arizona, the League of United Latin American Citizens Arizona ("LULAC"), and the Arizona Advocacy Network, which is a coalition of nonprofit public interest organizations); and an individual member of the Arizona Legislature. *ITCA, et al. v. Brewer*, no. 2:06-cv-1362, Complaint at ¶¶ 1-

7.[26] The *ITCA* Complaint alleges that imposing the new "evidence of citizenship" procedure on persons using the Federal Form injures individual members of ITCA's constituent Tribes, the Hopi Tribe, and LULAC because of the difficulties many members face in obtaining the requisite evidence, and also injures the Hopi Tribe and the plaintiff organizations because it causes them to expend additional resources to carry out their voter registration programs. *Id.* at ¶¶ 27-32. The *Gonzalez* plaintiffs include several individuals and advocacy organizations (the Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., and the Arizona Community Forum), who similarly allege that the supplemental procedure injures individuals and voter registration programs. *Gonzalez, et al. v. Arizona, et al.*, no. 2:06-cv-1268, Complaint at ¶¶ 5-14, 68-70.[27]

Defendants include the State of Arizona and the Arizona Secretary of State, sued in his official capacity (hereinafter, "Arizona"). Defendants also include Arizona County Recorders and Elections Directors for 13 of Arizona's 15 counties, also sued in their official capacities (hereinafter, "Arizona Counties" or "Counties").

Arizona and the Counties take the instant appeal from an *en banc* decision of the Ninth Circuit

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[26] One nonprofit organization that originally was named was voluntarily dismissed from the case.

[27] Two of the original individual plaintiffs were voluntarily dismissed, and another organizational plaintiff, Project Vote, was added after suit was filed.

in which that court held, by a vote of eight to two, "that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections," as applied to the Federal Form. Pet. App. 59c.[28] The preceding Ninth Circuit panel also reached the same conclusion, Pet. App. 78a, in a decision authored by Circuit Judge Ikuta and joined by Justice O'Connor, sitting by designation. Pet. App. 5a.[29]

The *en banc* court, in an opinion by Judge Ikuta, undertook a three-step analysis of whether the NVRA supersedes the Arizona procedure, as applied to the Federal Form. The Ninth Circuit "first consider[ed] whether the framework of the Elections Clause or the Supremacy Clause [Art. VI, cl. 2] properly governed [the] question [presented]." Pet. App. 11c. The court undertook a detailed analysis of both clauses, Pet. App. 11c-17c, and concluded that the Elections Clause provided the proper basis for analysis. Pet. App. 17c. The court explained that the "Elections Clause affects . . . an area in which the states have no inherent or reserved power: the regulation of federal elections," Pet. App. 16c; States lack such power since "federal elections did not exist prior to the formation of the federal government." *Id.* The Ninth Circuit contrasted the Elections Clause

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[28] The *en banc* court affirmed the district court's ruling that another provision of Proposition 200, concerning voter identification at the polls, is lawful. Pet. App. 59c. Plaintiffs did not petition this Court for a review of that ruling.

[29] Chief Judge Kozinski dissented from the panel decision. Pet. App. 79a. However, as discussed below, Judge Kozinski then joined in the *en banc* holding. Pet. App. 89c.

with the very different Supremacy Clause. Whereas the Elections Clause functions in the Federal sovereign's own particular realm, the Supremacy Clause functions in "our system of dual sovereignty," *id.*, to mediate the relationship between the Federal government and the States. Thus, "special guidelines" apply to addressing issues in that context, *id.*, but those guidelines do not apply to Elections Clause questions. Pet. App. 16c.

Second, the Ninth Circuit analyzed the "approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections." Pet. App. 19c-20c. After reviewing this Court's decisions – particularly, *Ex Parte Siebold*, 100 U.S. 371 (1879), and *Foster v. Love*, 522 U.S. 67 (1997) – the Court identified the following governing principles: Federal and State laws should be understood to "comprise a single system of federal election procedures"; whether Federal law supersedes a particular State law should be "based on a natural reading of the two laws"; and Federal law supersedes in those instances where "the two statutes do not operate harmoniously in a single procedural scheme." Pet. App. 20c.

Finally, the Ninth Circuit applied this Elections Clause analysis to the NVRA and the Arizona procedure, and concluded that these provisions not only "do not operate harmoniously," they "are seriously out of tune with each other." Pet. App. 30c. In particular, the court held that, "under a natural reading of the NVRA," Pet. App. 31c, there was a "direct conflict" between the NVRA's mandate

that Arizona election officials "accept and use" the Federal Form, 42 U.S.C. § 1973gg-4(a)(1), and "Arizona's rejection of every Federal Form submitted without proof of citizenship." *Id.* Furthermore, "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the conflict between the state and federal procedures." Pet. App. 34c. More broadly speaking, the court concluded that "Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process," Pet. App. 36c, because it "makes the Federal Form much more difficult to use. . . . [M]uch of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." Pet. App. 36c-37c.[30]

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[30] The *en banc* court rejected the argument, relied upon heavily by the two dissenters, that Arizona may incorporate its supplemental procedure into the Federal Form because the NVRA allows States to implement their own mail-in form for Federal elections, and because the NVRA purportedly allows States to implement a supplemental verification procedure as part of such a form. The majority disagreed, citing the fact that the NVRA specifically provides that use of any State form must be "in addition to" the Federal Form, 42 U.S.C. § 1973gg-4(a)(2), Pet. App. 33c-34c, and that the NVRA "entrusted . . . to the EAC," not the States, the decision as to what provisions may be incorporated into the Federal Form. Pet. App. 35c-36c. The court also noted that it was not deciding whether the NVRA allows Arizona to incorporate its procedure into its State mail-in form for Federal elections, Pet. App. 35c, since neither group of plaintiffs "challenge[d] Proposition 200's registration provision as applied to Arizona's State Form." Pet. App. 29c n.24.

The Ninth Circuit recognized the validity of "Arizona's concern about fraudulent voter registration." Pet. App. 41c. As a factual matter, however, "Congress was well aware of the problem of voter fraud when it passed the [NVRA] and provided for numerous fraud protections in the [Act]." *Id.* The Ninth Circuit listed many of these protections, including the requirement that registration applications for Federal elections be signed under penalty of perjury. *Id.* n.28. As a legal matter, moreover, "the Elections Clause gives Congress the last word on how [the voter fraud] concern will be addressed" regarding elections for Federal office. Pet. App. 41c.

Chief Judge Kozinski filed a concurring opinion. He agreed that the result turned on the meaning of the NVRA's "accept and use" requirement as to the Federal Form. Pet. App. 89c. Unlike the other Ninth Circuit judges in the majority, however, he believed that this language, "as a linguistic matter," could be read either way, as precluding or not precluding Arizona from applying its supplemental procedure to the Federal Form. *Id.* He therefore proceeded to examine the NVRA's legislative history, and concluded that this history plainly demonstrates that Arizona was violating the "accept and use" requirement because "both chambers [of Congress had] affirmatively rejected efforts to authorize precisely what Arizona is seeking

to do." Pet. App. 94c. Accordingly, Judge Kozinski joined in the *en banc* ruling. Pet. App. 95c.[31]

Judge Rawlinson, joined by Judge N.R. Smith, dissented from the NVRA ruling. Pet. App. 100c.[32] They concluded that Arizona is allowed to apply Proposition 200 to the Federal Form under the NVRA's "accept and use" requirement, Pet. App. 105c-106c, and under the NVRA provision specifying that States may implement their own mail-in registration form for Federal elections "in addition to" the Federal Form. Pet. App. 102c-103c.

Arizona and the Arizona Counties sought a stay of the Ninth Circuit's mandate, which was denied by the *en banc* court and then by this Court. 133 S. Ct. 55 (2012). Arizona and the Counties petitioned for a writ of certiorari, which was granted.

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[31] Judge Kozinski explained that his *en banc* concurrence was consistent with his prior dissent as a member of the earlier three-judge panel because the two courts were called upon to decide different legal issues. The *en banc* court was required "to construe the [NVRA] de novo." Pet. App. 94c. On the other hand, the panel was "bound by the law of the circuit and the law of the case," Pet. App. 94c-95c, because an earlier Ninth Circuit panel had held (at the preliminary injunction stage of these cases) that the NVRA did not supersede Proposition 200 as to the Federal Form. Accordingly, in his panel dissent, Judge Kozinski simply "deferred to the earlier panel's construction." Pet. App. 95c. That, of course, was no longer a consideration once the cases were heard *en banc*. In their merits briefs, Arizona and the Counties repeatedly cite to Judge Kozinski's panel dissent rather than to his *en banc* concurrence.

[32] They concurred in the majority's decision upholding Proposition 200's voter identification requirement at the polls. Pet. App. 100c.

133 S. Ct. 476 (2012). While the petition was pending, the district court, pursuant to the Ninth Circuit mandate, entered an injunction on August 15, 2012 barring Arizona from applying the supplemental verification procedure to registration applicants using the Federal Form. App. 381-84.[33]

SUMMARY OF ARGUMENT

Congress has plenary authority under the Elections Clause to make or alter the procedures for conducting elections for Federal office, including the procedures for voter registration. The Constitution grants this authority to Congress in order to advance the unique interest of the Federal government in regulating the manner by which its officials are selected.

The Arizona "evidence of citizenship" procedure conflicts with the NVRA insofar as Arizona conditions its acceptance of completed Federal Forms upon compliance with that procedure. The NVRA requires the State to "accept and use" the Federal Form as prescribed by the EAC, and the Arizona procedure is not incorporated into the Federal Form. Nonetheless, Arizona law requires that election

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[33] As detailed by Arizona and the Arizona Counties in their briefs, the procedural history of these consolidated cases also includes rulings by the district court and several earlier rulings by the Ninth Circuit, as well as a decision by this Court. State Br. at 21-22; County Br. at 25-27. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), this Court vacated a preliminary injunction entered by a motions panel of the Ninth Circuit shortly before the 2006 general election. The Court in *Purcell* did not address the Elections Clause and NVRA issues presented here.

officials "reject" Federal Forms not accompanied by the State-defined "satisfactory evidence" of citizenship, thus rendering inoperable in Arizona the Federal Form prescribed by the EAC. This usurps the EAC's authority and conflicts with a natural reading of the NVRA's "accept and use" mandate, and thus is void under the Elections Clause.

This conflict in the respective statutory provisions is sufficient to resolve the instant dispute. However, an examination of Congress' object in enacting the NVRA further confirms the existence of the conflict. Arizona's claim to a supervening State authority over the Federal Form directly contravenes Congress' purpose to create a single, national, and uniform voter registration form for Federal elections. Moreover, Congress specifically considered and rejected a provision that would have allowed States to do precisely what Arizona has proposed, *i.e.*, Congress rejected an amendment to the NVRA that would have permitted States to incorporate an "evidence of citizenship" procedure into the Federal Form that goes beyond the attestation procedure.

The NVRA's supersession of the Arizona procedure presents no constitutional concern. Under the Elections Clause, Congress indisputably has the authority to regulate voter registration for Federal elections, and the Arizona provision at issue here is, by its terms, a voter registration procedure. While the Constitution grants States the authority generally to prescribe voter qualifications for Federal elections, neither the NVRA nor the Arizona procedure alters Arizona's voting qualifications. Preemption of the Arizona procedure likewise would

not alter that State's voting qualifications or prevent their enforcement. In short, NVRA preemption in these cases involves an unremarkable application of Congress' Elections Clause authority.

ARGUMENT

I. The Elections Clause, Not The Supremacy Clause, Governs Whether The Arizona Supplemental Verification Procedure Is Superseded By The NVRA

The Elections Clause provides that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Art. I, sec. 4, cl. 1. Accordingly, under the Elections Clause, State law controls in the absence of Congressional regulation of the "Times, Places, and Manner" of Federal elections. But when Congress acts in this arena, "[t]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. at 384. *Accord*, *Foster v. Love*, 552 U.S. at 69; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995); *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932).

As this Court explained in *U.S. Term Limits v. Thornton*, the Elections Clause was a central component of the Framers' conception of a "revolutionary . . . [new] Government," 514 U.S. at 803: "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a

collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States." *Id.* The Framers concluded that one defect of the Articles of Confederation was that the States had full authority to refuse to conduct Federal elections, and thus could frustrate the operation of the national government. *Id.* at 808-09. To guard against potential abuse, the Framers gave Congress paramount authority to prescribe national election procedures. *Id.* at 809, *citing* The Federalist No. 59, at 363 (Alexander Hamilton).

The Court in *U.S. Term Limits* held that "[t]he Tenth Amendment," with its reservation of powers to the States, "provides no basis for concluding that the States possess reserved power to add [Federal election provisions] to those that are fixed in the Constitution," because "electing representatives to the National Legislature was a new right, arising from the Constitution itself." *Id.* at 805. As Justice Kennedy similarly observed in his concurring opinion in that case, the election of Federal officials is a "sovereign federal province," *id.* at 841, and "[n]othing in the Constitution . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Id.* at 842.

Thus, in its most recent Elections Clause decision, *Foster v. Love*, *supra*, the Court summarily rejected the claim that state sovereignty is a factor in an Elections Clause analysis when Congress acts within the "ample limits of the Elections Clause's

grant of authority." 522 U.S. at 71. *Foster* held that Congress' fixing of a date for Federal elections in 2 U.S.C. § 7 superseded a Louisiana "open primary" law that allowed Senators and Representatives to be elected on a different date. Simply put, the State law "conflict[ed] with federal law and to that extent [was] void." 522 U.S. at 74. The Court's holding that the State law had to give way to the Federal law turned entirely on a comparison of the two measures. *Id.* at 71. Louisiana's "invocations of state sovereignty" in support of its election date law presented "no colorable argument" under the Elections Clause. *Id.*[34]

This is a different analysis than under the Supremacy Clause. The Supremacy Clause embodies the Framers' vision of "a system of dual sovereignty between the States and the Federal Government" regarding the exercise of governmental police powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, "[t]he Constitution created a Federal Government of limited powers," *id.*, where, as specified by the Tenth Amendment, the national government's powers are those "'delegated to [it] by the Constitution,'" and authority otherwise is "'reserved to the States . . . or to the people.'" *Id.* (quoting the Tenth Amendment). In light of this constitutional design, respect for state sovereignty and a reluctance to intrude upon the exercise of a

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[34] The Court's conclusion in *Foster* that the State law conflicted with the Federal law did "not depend on discerning the intent behind the federal statute," although the conclusion that the State and Federal statutes conflicted was "buttressed by an appreciation of Congress's object." *Foster*, 522 U.S. at 74.

State's police powers long have animated the Court's Supremacy Clause jurisprudence. See *Rice v. Santa Fe Elec. Corp.* 331 U.S. 218, 230 (1947).

As the Ninth Circuit observed, Pet. App. 16c-17c, this Court has never relied upon Supremacy Clause principles in its Elections Clause decisions. That is as it should be. This Court has recognized, for example, a presumption against preemption under the Supremacy Clause in light of the sovereignty concerns that arise under that Clause. *E.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). But "invocations of state sovereignty" have no place under the Elections Clause. *Foster*, 522 U.S. at 71. The only question under the Elections Clause, as *Foster* shows, is whether the State and Federal statutes, naturally construed, conflict with one another.[35] Arizona is thus wrong to ask the Court to import the more elaborate Supremacy Clause preemption analysis into the straightforward conflict analysis that the Elections Clause demands.[36] The

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[35] This also is how the Ninth Circuit analyzed the preemption question, Pet. App. 20c, in concluding that the Arizona law conflicts with the NVRA. Pet. App. 31c, 34c, 59c.

[36] Nonetheless, Arizona claims that the Court "applied Supremacy Clause preemption principles in *Foster*." State Br. at 32. The State claims to detect the Supremacy Clause at work in *Foster* based upon the Court's statement that "[t]he Fifth Circuit's conception of the issue here . . . [was] exactly right," 522 U.S. at 71, and the fact that the Fifth Circuit discussed the Supremacy Clause in its *Foster* opinion, 90 F.3d 1026, 1031 (1996). State Br. at 32-33. However, what the Court said the Fifth Circuit got "exactly right" was not its Supremacy Clause analysis, but only that "the issue here [was] a narrow one turning entirely on the meaning of the state and federal

Court should reject Arizona's attempt to conflate these distinct provisions of the Constitution.[37]

II. Arizona's Supplemental "Evidence Of Citizenship" Procedure, As Applied To The Federal Form, Conflicts With The NVRA, And Therefore Is Superseded Under The Elections Clause

A. Arizona Does Not "Accept and Use" the Federal Form Within the Meaning of the NVRA

The NVRA gives the EAC responsibility and authority to "develop" a uniform Federal Form for the registration of voters in elections for Federal office. 42 U.S.C. § 1973gg-7(a)(2). The EAC must "consult[]" with the States in developing the Federal Form, *id.*, but final authority to determine the contents of the application, including the Form's instructions, belongs to the EAC alone. As defined by the EAC,

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statutes," 522 U.S. at 71; the Court did not refer to the Fifth Circuit's mode of analysis at all. Arizona also argues that the *Foster* Court did not mention the Supremacy Clause's "presumption against preemption or the plain statement rule" because the Court "did not need to." State Br. at 33 n.6. Be that as it may, it is plainly the case that this Court would have included at least a general discussion of Supremacy Clause principles in *Foster* if the Supremacy Clause had been the basis for, or otherwise bore upon, its decision.

[37] In any event, Arizona concedes that if there is a conflict between the NVRA and the Arizona procedure, the State procedure is preempted regardless of whether the Elections Clause is read in light of this Court's Supremacy Clause jurisprudence. State Br. at 31-34.

the Federal Form "consist[s]" of the portion that registrants fill out, and also "general instructions" and "state-specific" instructions. 11 C.F.R. § 9428.3(a). The NVRA commands that "[e]ach State shall accept and use the mail voter registration application prescribed by the [EAC] . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1).

As provided by the NVRA and HAVA, the Federal Form "prescribed" by the EAC, for use by Arizona and the other covered States in conducting Federal elections, requires that registration applicants attest to their U.S. citizenship under penalty of perjury. The Form does not require that applicants provide any additional evidence of citizenship, and does not reference the Arizona supplemental procedure in any manner.

Arizona claims that rejecting every fully-completed Federal Form that does not provide "satisfactory evidence of United States citizenship," as defined by Ariz. Rev. Stat. § 16-166(F), is consistent with the NVRA's "accept and use" requirement. The *en banc* Ninth Circuit disagreed, concluding that "under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." Pet. App. 31c. That reading is compelled by the statutory text, its context and structure, and the foundational legislative purpose and intent.

1. The NVRA, by its terms, precludes Arizona from implementing its supplemental verification procedure for Federal Form applicants.

The straightforward provisions of the NVRA demonstrate the conflict between the registration procedure mandated by Congress and Arizona's supplemental verification procedure. It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Accordingly, this Court should look to what Congress meant when it commanded the States to "accept and use" a specified voter registration form for Federal elections. What the words "accept and use" might mean in the abstract is not what is at issue in these cases.

The natural way for election officials to "accept and use [a specified form] for . . . registration," 42 U.S.C. § 1973gg-4(a)(1), which has been fully and correctly filled out according to the instructions that accompany the form, is to register the applicant without requiring anything more from that individual. That is what Congress commanded the States to do with the Federal Form "develop[ed]" by the EAC.

In administrative practice, it is standard for a form with its instructions to constitute a complete package, with nothing else required. *Cf. Sims v.*

Apfel, 530 U.S. 103, 111–12 (2000) (finding no exhaustion requirement where form provided to Social Security claimants required only the identification of a grievance). This practice also is commonplace in judicial procedure. For example, the instructions to a jury must correctly and fully tell the jury how to fill out the verdict form. *See, e.g.*, *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (vacating and remanding judgment imposing death penalty on grounds there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."). Similarly, if the Court were to direct its clerk to "accept and use" a particular form, with prescribed instructions, for parties seeking membership in the Court's bar, the Court would be justifiably frustrated if the Clerk then rejected applicants based on additional criteria not included in the form or disclosed in the instructions that the Court had prescribed.[38]

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[38] This is all quite different from the analog suggested by Judge Rawlinson below and those included in Arizona's brief. Judge Rawlinson, for example, notes that "merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card." Pet. App. 105c. Those examples, however, avoid the issue here, which is the sufficiency of a stand-alone *form*.

Congress decided to delegate to the EAC – and not to the individual States – the ultimate authority to "develop" the Form, and thus decide what information was "necessary" to assess eligibility in using the Federal Form. 42 U.S.C. § 1973gg-7(a)(2) & (b)(1). Congress could have elected to give the States the power to dictate their own State-specific instructions for use of the Federal Form. In that regard, the statute, 42 U.S.C. § 1973gg-4(a)(2), authorizes States to use their own mail-in forms for Federal elections but only "[i]n addition to" the Federal Form. Accordingly, it would render Section 4(a)(1) superfluous to construe it as doing no more than allowing States to implement a derivative mail-in registration form to the exclusion of the Federal Form prescribed by the EAC.

2. Other provisions of the NVRA confirm the conflict between the statute and Arizona's supplemental procedure.

The NVRA as a whole reinforces the conflict. As Arizona acknowledges, this Court construes a "particular clause" of a statute, not on its own, but by "tak[ing] in connection with it the whole statute." State Br. at 40 (quoting *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 573 (1989)).

The NVRA contemplates that the Federal Form – which Arizona has never challenged – is sufficient to allow election officials to assess eligibility. As the text of the statute indicates, the EAC is to include "such identifying information . . .

and other information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant," 42 U.S.C. §1973gg-7(b)(1); and the EAC shall "specif[y] each eligibility requirement (including citizenship)," and include "an attestation that the applicant meets each such requirement." 42 U.S.C. §1973gg-7(b)(2).

The statute also requires each State, "[i]n the administration of voter registration for elections for Federal office," to "ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is [timely] postmarked." 42 U.S.C. 1973gg-6(a)(1)(B). The statute provides that the Federal Form is "valid" and the Form includes the procedures mandated by Congress for applicants to verify that they are "eligible," and so States generally must "ensure" that persons properly and fully completing the Federal Form are registered.[39]

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[39] None of this suggests that a State would be forced to register a person even if it had "absolute documented proof," extrinsic to the Federal Form, that an applicant was not a citizen (or was otherwise eligible). *Contra* State Br. at 2-3. The NVRA addresses what may be demanded *from an applicant* in order to decide if the applicant is eligible. If the State has "absolute" extrinsic evidence that shows that an applicant is not eligible, nothing in the statute bars the State from using it.

3. The conflict between the NVRA and the Arizona procedure is further shown by Congress' purpose in enacting the NVRA and by the statute's legislative history.

Because the text of the NVRA reveals that the Arizona procedure conflicts, the Court need not "discern[] the intent behind the federal statute." *Foster*, 522 U.S. at 73. However, the conclusion that that the NVRA and Arizona law conflict "is buttressed by an appreciation of Congress's object." *Id.*

In order to "increase the number of eligible citizens who register to vote in elections for Federal office," 42 U.S.C. § 1973gg(b)(1) Congress concluded that an integral component of by-mail registration is the development and use of a uniform, national registration form. Arizona's construction of the phrase "accept and use" frustrates that congressional purpose. As Chief Judge Kozinski explained, Arizona's "construction defers to state and local interests while sacrificing national uniformity." Pet. App. 89c. It thus would reinstate the status quo that Congress sought to replace: a disharmonious array of State registration forms and procedural requirements with no national and uniform alternative method of voter registration for elections for Federal office.

Moreover, Congress was fully cognizant of the fact that citizenship is a universal qualification for voting, provided specific citizenship verification

procedures for the Federal Form in the NVRA and HAVA, and affirmatively rejected a proposal to allow for the type of "evidence of citizenship" procedure enacted by Arizona. *See John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 101 (1993) (this Court is "directed by th[e] words" Congress enacted, "not by the discarded draft.").

As described by Chief Judge Kozinski, the Senate version of the legislation that became the NVRA included a provision specifically allowing States to implement a citizenship verification procedure beyond attestation of voting eligibility, while the House version did not. H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49. Specifically, the Senate would have provided that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." *Id.* at 23, 1993 U.S.C.C.A.N. at 148. The Conference Committee rejected the Senate provision, explaining that not only was it "not necessary," it was "not . . . consistent with the purposes of this Act." *Id.* The Conference Committee was "concern[ed]" that the Senate's provision "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and worried that it would "adversely affect the administration of the other registration programs as well." *Id.* The House and Senate then adopted the Conference Committee's version of the legislation. 139 Cong. Rec. H2276 (daily ed. May 5, 1993); 139 Cong. Rec. S5747-48 (daily ed. May 11, 1993).

Arizona and the Counties, as well as those filing *amicus* briefs on their behalf, contend that Proposition 200 is not superseded by the NVRA because one of Congress' purposes was "to protect the integrity of the electoral process." 42 U.S.C. § 1973gg(b)(3), which also is the given rationale for Proposition 200. However, Arizona's unilateral implementation of its "evidence of citizenship" procedure is not consistent with Congress' object since it directly undermines Congress' desire to establish a national, uniform, simple, and easy-to-use by-mail system for registering for Federal elections. Furthermore, Congress did enact specific procedures in both the NVRA and HAVA, "to protect the integrity of the electoral process" – including specifying procedures for verification of voting eligibility, and providing substantial criminal penalties for making false or fraudulent statements in connection with voter registration (42 U.S.C. § 1973gg-10) – and, as just discussed, Congress explicitly rejected the type of supplemental verification procedure adopted by Arizona.

Finally, Arizona's and the Counties' reliance on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is misplaced. To be sure, the Court there said that States, including Arizona, have a "compelling interest in preserving the integrity of [their] election process." *Id.* at 4 (internal quotation marks omitted). The Court's decision, however, was a limited one. The question presented was only whether a two-judge motions panel of the Ninth Circuit, earlier in the instant cases, properly entered an interlocutory injunction (on appeal from the district court's denial of motions for a preliminary injunction). This Court

evaluated the propriety of preliminary relief in terms of the district court's analysis, and cautioned that it "express[ed] no opinion . . . on the ultimate resolution of these cases." *Id.* at 5. In particular, the Court did not discuss, or indeed make any reference to, the NVRA or the Elections Clause. Accordingly, the Court's decision in *Purcell* does not speak to the preemption issue now before the Court.[40]

B. Arizona's Criticisms of the EAC's Decisionmaking Are Misplaced

Arizona attempts to impugn the decision of EAC to deny Arizona's request to incorporate the Proposition 200 procedure into the Federal Form. These criticisms do not defeat the textual conflict between the NVRA and the Arizona procedure.

First, Arizona contends that the EAC has "extremely limited powers." State Br. at 44. This is beside the point, however, since it is undisputed that Congress specifically delegated to the EAC, and not to the States, the authority to "develop" the Federal Form.

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[40] The Counties also cite to this Court's decision in *Crawford v. Marion County*, 553 U.S. 181 (2008), in support of their argument that the Arizona procedure is consistent with Congress' policy goals in enacting the NVRA. County Br. at 31-33. However, *Crawford* also neither addressed Congress' authority under the Elections Clause nor the validity of the NVRA, and instead dealt with the entirely distinct legal issue of whether a State election procedure (concerning voter identification at the polls, and not voter registration) imposed a facially unconstitutional burden on the right to vote.

Second, Arizona faults the internal procedures followed by the EAC in denying its request to incorporate the Proposition 200 procedure into the Federal Form. *Id.* at 45-46. But this fails to address the textual conflict since the NVRA allows Arizona to apply its procedure to the Federal Form only with the EAC's approval, and there is no dispute that the EAC has not granted the requisite approval. Furthermore, as detailed above, the EAC regulations – whose adoption Arizona does not question – specifically limit State discretion to vary the procedural requirements for registration applicants to successfully complete the Federal Form, and that discretion does not include any State authority to change the procedure by which applicants verify their eligibility to vote. 11 C.F.R. § 9428.4(a).[41]

Third, Arizona argues that this Court should not defer to the EAC's conclusion that the Arizona procedure is incompatible with the NVRA. State Br. at 46. The issue here, however, is not the EAC's conclusion *per se* or any deferral to it, but rather the NVRA's allocation of control over the Federal Form to a Federal agency, and not to the States.

Finally, Arizona never has sought to challenge either the EAC's initial rulemaking, which omitted citizenship verification procedures from the Federal Form procedures States may alter, or the EAC's specific denial of Arizona's request concerning the

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[41] Neither Arizona nor the Counties include any citation in their briefs to the principal EAC regulation governing the requirements for completing the Federal Form, 11 C.F.R. § 9428.4 (entitled "Contents" of the Federal Form).

Proposition 200 procedure. This case is not a proper forum for Arizona to indirectly challenge the EAC's decisions regarding the Federal Form, particularly since the EAC is not a party and Arizona has not given any reason why it could not have raised any such challenge directly in a lawsuit brought under the Administrative Procedure Act, 5 U.S.C. § 702. *See Gonzales v. Oregon*, 546 U.S. 243 (2006) (in response to U.S. Attorney General's interpretive rule under federal Controlled Substances Act, which would have negated the newly-enacted Oregon Death with Dignity Act, Oregon sought declaratory and injunctive relief under the Administrative Procedure Act and the Declaratory Judgment Act on grounds that the interpretive rule exceeded delegated authority and infringed upon state sovereignty). Rather than pursue the avenue of relief available to it, Arizona resorted to an inappropriate self-help remedy: it simply forged ahead and used the version of the Federal Form that it had lobbied for but that the EAC had rejected. Because Arizona failed to utilize the channels of the Administrative Procedure Act to make its case against the EAC's decision, it should not be heard now to argue that the agency's decision was wrong.

C. The NVRA Provisions Addressing the Role of the States in Conducting Voter Registration for Federal Elections Do Not Authorize States to Add a Citizenship Verification Procedure to the Federal Form

As noted by Arizona, the NVRA confers certain voter registration powers for Federal elections on the States, but those powers do not include the right to override the EAC determination regarding what is necessary for a registration applicant to complete the Federal Form.

Arizona points to a provision of the NVRA which says that the Federal Form "develop[ed]" by the EAC shall include "information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," 42 U.S.C. § 1973gg-7(b)(1). State Br. at 35, 38. Arizona further notes that, as provided by the NVRA, the EAC has acted "in consultation with . . . the States," 42 U.S.C. § 1973gg-7(a)(2), by including State-specific instructions with the Federal Form. State Br. at 35-37; see also County Br. at 33.

These provisions unquestionably show that the NVRA mandates that the *EAC* address State-specific qualifications by requiring applicants to provide the information "necessary" to assess compliance, but they provide no textual authorization for Arizona to supplement the EAC-prescribed Federal Form by

insisting upon its own verification procedure. Moreover, in requiring that "necessary" information be included in the Federal Form, the NVRA and HAVA go on to identify specific procedures for verifying applicants' citizenship, which do not include the Proposition 200 procedure. Likewise, with regard to the Federal Form's State-specific instructions, the EAC regulations specifically limit those instructions to issues other than verification of voting eligibility. 11 C.F.R. § 9428.4

Additionally, Arizona and the Counties cite to the NVRA provision that allows States to implement their own mail-in registration form for Federal elections "[i]n addition to accepting and using" the Federal Form, so long as the State form "meets all the criteria stated in 42 U.S.C. § 1973gg-7(b)]" regarding the contents of the Federal Form. 42 U.S.C. § 1973gg-4(a)(2). State Br. at 39; County Br. at 35. Arizona contends that this provision means that it may incorporate its "evidence of citizenship" procedure into its State mail-in registration form for Federal elections, and that this, in turn, should logically mean that Arizona may incorporate that procedure into the Federal Form as well. State Br. at 39.

This argument ignores the plain language of the NVRA, which specifies that States only may implement a State form "in addition to" the Federal Form, and not "instead of" that Form. Furthermore, the State form provisions cannot determine what may be incorporated into the Federal Form, since the NVRA specifically provides that States are limited to

a "consultation" role in the development of the Federal Form.[42]

III. The Elections Clause Gives Congress Power Over "Registration" Of Federal Voters, So The NVRA's Supersession Of The Arizona Procedure Presents No Constitutional Concern

The NVRA properly regulates the "Manner" in which Federal elections are conducted, as this Court has construed that term. Accordingly, the NVRA's supersession of Arizona's supplemental verification procedure for Federal Form applicants does not present any constitutional concern.

The Court long has recognized that the "ample limits of the Elections Clause's grant of authority to Congress," *Foster v. Love*, 522 U.S. at 71, include the authority to establish voter registration procedures for Federal elections. As explained in *Smiley v. Holm*, 285 U.S. at 366, "[i]t cannot be

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[42] Both Arizona and the Counties cite to this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997). State Br. at 38-39; County Br. at 34-35. But that decision is inapposite. It dealt with the application of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to measures adopted by the State of Mississippi to implement the NVRA. The Court did not address Congress' authority under the Elections Clause, the EAC's authority to "develop" the Federal Form, or States' obligation to "accept and use" the Form. Also, as the Ninth Circuit noted, Pet. App. 29c n.24, the instant cases do not present the question whether Arizona may implement its "evidence of citizenship" procedure for persons who apply to register for Federal elections using the State of Arizona's mail-in registration form.

doubted that [the Election Clause's] comprehensive words embrace authority to provide a complete code for congressional elections." *Smiley* set forth a non-exhaustive list of the "Manner" regulations which Congress may prescribe, including, notably, voter registration:

> notices, *registration*, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, . . . the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. (emphasis added).

In *Siebold*, the Court rejected a challenge to the constitutionality under the Elections Clause of a Federal law that included comprehensive provisions relating to voter registration. That law provided for appointment of Federal officials to oversee (in person) the voter registration process for Federal elections, authorizing such officials to review the registration rolls prepared by local officials, and to directly undertake voter registration for such elections. *Siebold*, 100 U.S. at 379-80 ("'The [officials] are authorized and required to attend all times and places fixed for registration of voters to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked;

[and] to inspect and scrutinize such register of voters'")(quoting Section 2016 Revised Statutes).

In light of these precedents, the lower courts uniformly have upheld the NVRA's constitutionality under the Elections Clause. *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946 (D. S.C. 1995).

Arizona does not dispute these fundamental propositions. It neither claims that Congress lacks the authority under the Elections Clause to regulate voter registration for Federal elections, nor that the NVRA is unconstitutional on its face. State Br. at 50. Nonetheless, it urges this Court – for the first time in this case – to avoid a supposed constitutional concern by narrowly construing the statute's "accept and use" mandate.[43]

The State argues that the Elections Clause "does not authorize Congress here to evade the restraints of the Voter Qualifications Clauses." State Br. at 50 (referring to the Constitution's delegation of authority to the States to set voting qualifications for Federal elections, in Article I, section 2, clause 1, and the Seventeenth Amendment). The suggestion

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[43] Because Arizona has not previously raised any constitutional issue in these cases, it is precluded from now challenging the NVRA's constitutionality directly. *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011); *United States v. Williams*, 504 U.S. 36, 41 (1992).

apparently is that Arizona's "sufficient evidence" provision is a "voter qualification" rather than a matter of registration procedure and hence does not collide with Congress' authority to regulate the manner of Federal elections. State Br. at 53 (referring to the State's "evidence-of-citizenship qualification for voting in federal elections").

But Proposition 200, by its terms, did not alter the qualifications for individuals to vote in elections in Arizona. The Arizona Constitution (art. VII, § 2) specifies the State's voting qualifications, including U.S. citizenship, and Proposition 200 did not amend the State constitutional provisions. Instead, it amended the Arizona Elections and Electors Code to alter the manner in which the voter registration system operates with regard to applicants verifying their U.S. citizenship. Accordingly, it is a misnomer for Arizona to contend that NVRA supersession of Proposition 200 involves anything other than Congress regulating the "Manner of holding [Federal] Elections." *See Foster v. Love*, 522 U.S. at 72 (Louisiana's claim that its "open primary" law did not prescribe the times for conducting Federal elections "is merely wordplay, and wordplay just as much at odds with the Louisiana statute as that law is at odds with [the Federal statute].").

The State likens the instant cases to *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). But there is no resemblance. *U.S. Term Limits* dealt with an Arkansas law that sought to prescribe the qualifications for membership in Congress, by imposing term limits, and did not concern the "Manner" in which Senators and Representatives are

elected. *Id.* at 783. The asserted conflict with the Constitution, accordingly, was not with the authority delegated by the Elections Clause, but rather with Article I, section 2, clause 2 and Article I, section 3, clause 3, which prescribe the qualifications for serving in Congress. *Id.* at 782-83.

Arizona also claims that the NVRA "intrudes" on its voting qualifications, although it does not explain how this purported "intrusion" is constitutionally significant. State Br. at 50. The State cites to dicta in the Seventh Circuit's *ACORN v. Edgar* opinion (upholding the constitutionality of the NVRA) that, if Congress had "'designed [the NVRA] with devilish cunning to make it impossible for [a] state to enforce its voter qualifications,'" then perhaps a colorable claim might exist that Congress exceeded its authority under the Elections Clause. *Id. citing* 56 F.3d at 795.

But even if that were the law, the NVRA does not make it "impossible" for States to verify that registration applicants are U.S. citizens, and Arizona makes no such claim here. State Br. at 50. The detailed procedures included in the Federal Form to exclude non-citizens from registering to vote are essentially the same as those which Arizona relied upon for decades prior to Proposition 200 for verifying the citizenship of registration applicants. Arizona, moreover, continues to rely upon these procedures today for those persons whose voter registrations were "grandfathered-in" by Proposition

200 based on their compliance with the verification procedure in use prior to Proposition 200.[44]

At most, the NVRA may have the "[i]ndirect effect[]" of "mak[ing] it more difficult to enforce some of the qualifications" to vote, which *ACORN* expressly held posed no constitutional problem. 56 F.3d at 794. As Judge Posner explained in *ACORN*, "[s]uch effects are bound to follow from any effort to make or alter state regulations of the times, places, and manner of conducting elections, including the registration phase." *Id.* at 794-95. Since such effects are necessarily permitted by the Elections Clause's grant of authority to Congress, they are not a reason to discard a Congressional statute.

In sum, the NVRA falls within Congress' Elections Clause authority to prescribe voter registration procedures for Federal elections. Thus, no constitutional concern is presented here that would warrant departing from a proper interpretation of the NVRA, as enacted by Congress.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

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[44] The record shows that, prior to the enactment of Proposition 200, election officials were able to identify individuals who falsely registered to vote as non-citizens and referred them for potential prosecution. App. 321-26.

Respectfully submitted,

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ADDENDUM

ADDENDUM

NATIONAL VOTER REGISTRATION ACT (selected provisions)

42 USC § 1973gg-4 Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg–7 (a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg–7 (b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if—

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person—

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee–1 (b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg–6 (a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg–6 (d) of this title.

42 USC § 1973gg-7 Federal coordination and regulations

(a) In general

The Election Assistance Commission—

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2) of this section—

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that—

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application—

(i) the information required in section 1973gg–6 (a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

HELP AMERICA VOTE ACT (selected provision)

42 U.S.C. § 15483

. . . .

(b) Requirements for voters who register by mail

4) Contents of mail-in registration

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide

the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

. . . .

EAC REGULATONS

11 CFR § 9428, Subpart B – National Voter Registration Form

§ 9428.3 General information.

(a) The national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 9428.4; general instructions for completing the application; and accompanying state-specific instructions.

(b) The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements.

(c) States shall accept, use, and make available the form described in this section.

§ 9428.4 Contents.

(a) Information about the applicant. The application shall provide appropriate fields for the applicant's:

(1) Last, first, and middle name, any suffix, and (optional) any prefix;

(2) Address where the applicant lives including: street number and street name, or rural route with a box number; apartment or unit number; city, town, or village name; state; and zip code; with instructions to draw a locational map if the applicant lives in a rural district or has a non-traditional residence, and directions not to use a post office box or rural route without a box number;

(3) Mailing address if different from the address where the applicant lives, such as a post office box, rural route without a box number, or other street address; city, town, or village name; state; and zip code;

(4) Month, day, and year of birth;

(5) Telephone number (optional); and

(6) Voter identification number as required or requested by the applicant's state of residence for election administration purposes.

(i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine what type of voter identification number, if any, is required or requested by the applicant's state.

(ii) For each state that requires the applicant's full social security number as its voter identification number, the state's Privacy Act notice required at 11 CFR 9428.6(c) shall be reprinted with the instructions for that state.

(7) Political party preference, for an applicant in a closed primary state.

(i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine if the applicant's state is a closed primary state.

(ii) The accompanying instructions shall state that if the applicant is registering in a state that requires the declaration of party affiliation, then failure to indicate a political party preference, indicating "none", or selecting a party that is not recognized under state law may prevent the applicant from voting in partisan races in primary elections and participating in political party caucuses or conventions, but will not bar an applicant from voting in other elections.

(8) Race/ethnicity, if applicable for the applicant's state of residence. The application shall direct the applicant to consult the state-specific instructions to determine whether race/ethnicity is required or requested by the applicant's state.

(b) Additional information required by the Act. (42 U.S.C. 1973gg-7(b) (2) and (4)). The form shall also:

(1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompany state instructions;

(2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements;

(3) Provide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature;

(4) Inform an applicant on the application of the penalties provided by law for submitting a false voter registration application;

(5) Provide a field on the application for the name, address, and (optional) telephone number of the person who assisted the applicant in completing the form if the applicant is unable to sign the application without assistance;

(6) State that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(7) State that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

(c) Other information. The form will, if appropriate, require an applicant's former address or former name or request a drawing of the area where the applicant lives in relation to local landmarks.

§ 9428.5 Format.

(a) The application shall conform to the technical specifications described in the Commission's National Mail Voter Registration Form Technical Specifications.

(b) Size. The application shall consist of a 5" by 8" application card of sufficient stock and weight to satisfy postal regulations. The application card shall be attached by a perforated fold to another 5" by 8" card that contains space for the information set forth at 11 CFR 9428.4(c).

(c) Layout. (1) The application shall be sealable.

(2) The outside of the application shall contain an appropriate number of address lines to be completed by the applicant using the state information provided.

(3) Both sides of the application card shall contain space designated "For Official Use Only."

(d) Color. The application shall be of ink and paper colors of sufficient contrast to permit for optical scanning capabilities.

(e) Signature field. The application shall contain a signature field in lieu of a signature line.

(f) Type size. (1) All print on the form shall be of the largest practicable type size.

(2) The requirements on the form specified in 11 CFR 9428.4(b)(1), (6), and (7) shall be in print identical to that used in the attestation portion of the application required by 11 CFR 9428.4(b)(2).

§ 9428.6 Chief state election official.

(a) Each chief state election official shall certify to the Commission within 30 days after July 25, 1994:

(1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including but not limited to the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is a closed primary state.

(2) Any voter identification number that the state requires or requests; and

(3) Whether the state requires or requests a declaration of race/ethnicity;

(4) The state's deadline for accepting voter registration applications; and

(5) The state election office address where the application shall be mailed.

(b) If a state, in accordance with 11 CFR 9428.4(a)(2), requires the applicant's full social security number, the chief state election official shall provide the Commission with the text of the state's privacy statement required under the Privacy Act of 1974 (5 U.S.C. 552a note).

(c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section.

ARIZONA CONSTITUTIONAL AND STATUTORY PROVISIONS

Ariz. Const. art. VII, § 2 Qualifications of voters; disqualification

A. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

C. No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Ariz. Rev. Stat. § 16-166 Verification of registration

. . . .

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States

immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

G. Notwithstanding subsection F of this section, any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship unless the person is changing voter registration from one county to another.

H. For the purposes of this section, proof of voter registration from another state or county is not satisfactory evidence of citizenship.

I. A person who modifies voter registration records with a new residence ballot shall not be required to submit evidence of citizenship. After citizenship has been demonstrated to the county recorder, the person is not required to resubmit satisfactory evidence of citizenship in that county.

J. After a person has submitted satisfactory evidence of citizenship, the county recorder shall indicate this information in the person's permanent voter file. After two years the county recorder may destroy all documents that were submitted as evidence of citizenship.

REPLY BRIEF

Supreme Court, U.S.
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No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,
Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., and JESUS M. GONZALEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATE PETITIONERS' REPLY BRIEF

Respondents have essentially abandoned the Ninth Circuit's new legal test for preemption in Elections Clause cases. The Ninth Circuit held that, in Elections Clause cases, the court "need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." Pet. App. 16c (emphasis added). Instead, the court held that the state law would be preempted if it did not "operate harmoniously in a single procedural scheme" with a federal law that addresses the same subject. *Id.* at 20c. Respondents now acknowledge there must be a conflict between the federal and state law. Brief of Gonzalez Respondents (Gonzalez Br.) 48 (claiming that Arizona now concedes that there must be a conflict); Brief of the Inter Tribal Council Respondents (ITCA Br.) 33 (arguing that the only question under the Elections Clause is whether the state and federal statutes conflict with one another). State Petitioners indeed acknowledged there must be a conflict, stating that under this Court's controlling Elections Clause cases there has to be an actual conflict for preemption to apply, and even then, only "so far as the conflict extends" and "no farther." *Foster v. Love*, 522 U.S. 67, 69 (1997) (first quote); *Ex Parte Siebold*, 100 U.S. 371, 386 (1879) (second quote).

Respondents and Amicus United States persist, however, in arguing that the court of appeals correctly held that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns." Pet. App. 16c. *See* ITCA Br. 32-34; Brief of Amicus United States (U.S. Br.) 26-27. They therefore maintain that in assessing whether a federal election law preempts a

state law, courts should not strive to reconcile the two laws even where the laws are susceptible of such a construction. *Id.* That approach to Elections Clause preemption conflicts with this Court's Elections Clause cases and with bedrock federalism principles.

In any case, Arizona's Proposition 200 and the National Voter Registration Act (NVRA) are not in "conflict." In *Siebold*, this Court explained that a conflict exists only if both the federal and state laws "cannot be performed." 100 U.S. at 386. Under that standard, a federal election law "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395.

Compliance with both Proposition 200 and the NVRA is not a physical impossibility. Arizona has been "accept[ing] and us[ing]" the Federal Form and also applying its evidence-of-citizenship requirement for some seven years. To "accept and use" a document does not preclude requiring additional information. State Petitioners' Brief gave so many examples (a clerk who accepts and uses a credit card but asks for I.D., an airline that accepts and uses e-tickets but asks for I.D., an employer that accepts and uses an employment form but asks for additional information, etc.) that Respondent ITCA complained that "what the words 'accept and use' might mean in the abstract [read plain language] is not what is at issue in these cases." ITCA Br. 36.

But adding context, as ITCA suggests, strengthens Arizona's case. If Congress intended to prohibit additional information, it would not have authorized

States to acquire information "as is necessary to enable appropriate state election officials to assess the eligibility of the applicant" as it did in 42 U.S.C. § 1973gg-7(b)(2).

Furthermore, Congress included 42 U.S.C. § 1973gg-7(b)(3), which prohibited authentication, but did not prohibit additional information to assess the eligibility of the applicant. Under the contextual rule of *expressio unius est exclusio alterius*, Congress was making a deliberate choice not to exclude States asking for additional information.

This Court also has found conflict preemption "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Arizona law does not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Ninth Circuit erroneously implied that Congress's single controlling purpose and objective was the goal of "streamlining the registration process." Pet. App. 36c. Actually, Congress's purposes and objectives are set forth in 42 U.S.C. § 1973gg(b) as: (1) increasing the number of "*eligible* citizens" to register; (2) enhancing the participation of "*eligible* citizens"; (3) protecting the "*integrity*" of the process; and (4) ensuring "accurate and current" voter rules. (Emphasis added.)

The key question then becomes analyzing Arizona's requirements in light of the necessity to balance Congress's purposes and objectives, on the one hand, to increase participation, and, on the other hand, to

protect the integrity of the system and be sure that only "*eligible*" citizens vote.

Two factual determinations would be key in deciding whether Proposition 200 was an obstacle to "the full purposes and objectives of Congress." The first would be whether Proposition 200 imposed an unreasonable burden on increased voter participation. If there was *no* excessive burden, as this Court found in *Crawford v. Marion County*, 553 U.S. 181 (2008), then Proposition 200 does not stand as an obstacle to Congress's purposes. Second, is whether there was a genuine problem of voter fraud that justified Proposition 200's measures that furthered the "purposes and objectives" of protecting the integrity of the process and ensuring that only "eligible" citizens register.

The district court found that the burden on voter participation was not excessive: "Of approximately 20,000 voters ultimately unable to register to vote due to Proposition 200's proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to gain it." JA 291-92. Plaintiffs were able to produce only "one person . . . who [was] unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate that . persons rejected are in fact eligible to register to vote." *Id.*

The district court also found that voter fraud was a significant problem. *Id.* at 294.[1] For example, in 2005, in two Arizona counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner that they were not U.S. citizens. *Id.* at 267. Additionally, election officials testified that some voter registration organizations submitted "garbage" voter registration forms and had misled noncitizens into registering to vote. *Id.*

The issue is crucial because the district court's findings show that in balancing Congress's purposes and objectives, Proposition 200 serves an important purpose in protecting the integrity of elections, without any significant burden on the purpose of increasing participation by eligible citizens. It follows that the state law is not an obstacle to the accomplishment and execution of Congress's full purposes and objectives. It is therefore respectfully submitted that the NVRA does not preempt Proposition 200.

ARGUMENT

I. Ordinary Conflict Preemption Principles Apply to Elections Clause Legislation.

Respondents maintain that in assessing whether a federal election law preempts a state law, courts should

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[1] In *Crawford*, this Court noted that "flagrant examples" of voter fraud throughout the country "had been documented throughout this Nation's history by respected historians and journalists." 553 U.S. at 195-96. The Amicus Brief of The American Unity Legal Defense Fund provides substantial evidence of voter fraud throughout the country.

not strive to reconcile the two laws even where the laws are susceptible of such a construction. *E.g.*, ITCA Br. 32-34. That approach to Elections Clause preemption conflicts with this Court's Elections Clause cases and with bedrock federalism principles.

In *Siebold,* an election case, the Court recognized that the Elections Clause provides "concurrent authority of the two sovereignties, State and National, over the same subject-matter," analogized Congress's Elections Clause authority with its Commerce Clause authority over interstate commerce, 100 U.S. at 384-85, and noted that it must presume that, in exercising its power under the Elections Clause, "Congress has done so in a judicious manner; *that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations* [or] with the duties of State officers." *Id.* at 393 (emphasis added). Contrary to the Ninth Circuit's holding, this Court has therefore recognized that courts must respect the delicate balance between the two sovereignties in the Elections Clause context.

In arguing to the contrary, Respondents and the United States emphasize that the States' Article I, § 4 power is delegated, not reserved. Gonzales Br. 51. n.24; ITCA Br. 30-32; U.S. Br. 26. The conclusion they seek to draw—that courts in Elections Clause cases should not strive to harmonize federal and state law—is incorrect. The Court "endeavor[s] to guard as far as possible against any unnecessary interference with State laws and regulations," *Siebold*, 100 U.S. at 393, because "respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt'" state law.

Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009) (internal citation omitted). States have regulated elections within their borders, including for federal office, since the Nation's founding. That the source of that power (as it pertains to federal elections) is the Constitution itself does not change that foundational fact.

Respondents and the United States also argue that this Court should not "endeavor[ ] to guard as far as possible against any unnecessary interference with State laws and regulations" because federal Elections Clause enactments are "inherently federal in character." Gonzales Br. 51 n.24; ITCA Br. 30-31; U.S. Br. 26. That argument ignores the first half of Article I, § 4, which expressly empowers states legislatures to "prescribe[]" the "Times, Places, and Manners of holding Elections for Senators and Representatives." Election laws, including those governing the election of federal officers, are not "inherently federal in character" any more than regulation of interstate commerce within a given state.

Where Congress acts pursuant to its delegated authority, whether under the Elections Clause, the Commerce Clause, or otherwise, courts should exercise caution before finding state law thereby preempted under the Supremacy Clause. In another context, this Court rejected an argument "that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend" separation-of-power principles. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). The rationale applies with equal force here: the Elections Clause authority of Congress is not "of such

a wholly different nature" than other concurrent grants of authority that courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns."

II. There Is No Conflict Between the NVRA and Proposition 200.

A. The Term "Accept and Use" the Federal Form Does Not Conflict with Proposition 200's Requirement.

Perhaps the most telling sentence in Respondents' briefs is the following: "What the words 'accept and use' might mean in the abstract is not what is at issue in these cases." ITCA Br. 36. With all the examples in State Petitioners' brief of the ordinary meaning of "accept and use" that allow requiring additional information, it is no wonder that Respondents do not want the words "accept and use" to be interpreted according to their plain meaning, or as they put it, "in the abstract."

Adding context in the statute strengthens this interpretation of "accept and use." If Congress had intended to prohibit States from requesting other information necessary to enable officials to assess the eligibility of the applicant, it would not have expressly authorized the States to do just that in the state forms. But Congress did expressly authorize that. *See* 42 U.S.C. § 1973gg-4(a)(2); *id.* -7(b).

Respondents totally misunderstand the significance of 42 U.S.C. § 1973gg-4(a)(2) and -7(b). Respondents argued that § 1973gg-4(a)(2) and -7(b) are irrelevant

because the Federal Form must be provided in addition to the state form. That is not the point. The significance of § 1973gg-4(a)(2) and -7(b) is that they provide overall context, as to Congress's understanding of the term "accept and use." It makes no sense to infer a prohibition for additional information (there is no express prohibition) where Congress explicitly authorized that information on the state form and was silent as to whether or not it could be included in the Federal Form.

This becomes especially compelling when one considers that Congress knew how to prohibit information on the Federal Form and the state form. The NVRA expressly prohibits notarization, or other forms of authentication. 42 U.S.C. § 1973gg-7(b)(3). Statutory language that explicitly prohibits one thing indicates that there is no other implicit prohibition. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011).

B. The Election Assistance Commission Director's Failure to Include Arizona's Evidence-of-Citizenship Requirement Has No Preemptive Force.

The U.S. Elections Assistance Commission (EAC) (or rather its executive director) refused to include in the Federal Form an Arizona-specific instruction explaining that Arizona residents must provide evidence of citizenship to register. Respondents contend this denial has preemptive effect. This is incorrect.

First, the NVRA expressly empowers *state* election officials "to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). That would be a hollow power if it meant nothing more than eyeballing a form to see if all the required boxes showed eligibility on its face–whether accurately or not.

The United States insists that this result is required by 42 U.S.C. § 1973gg-6(a)(1)(B), which provides that "each State shall . . . ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days . . . before the election." U.S. Br. 14. That argument reads far too much into the provision.

The focus of the subsection is on the deadlines for the timely submission of registration forms, not defining the word "use" in the phrase "accept and use" that appears in a different subsection of the law. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 605-06 (2012) (criticizing the United States' contention that substantive statutory term should be construed based on language in separate provision that sets filing deadlines). Moreover, § 1973gg-6(a)(1)(B) directs state officials to register timely submitted registrations only with respect to "any *eligible* applicant" who submits a "*valid* voter registration form." (Emphasis added). The provision does not specify who determines whether an applicant is eligible or a voter registration form is valid. But § 1973gg-7(b)(1) directs *state* officials to assess eligibility.

If the United States were correct that States must register any applicant who has mailed "a timely,

completed Federal Form" (U.S. Br. 15), it would mean that States would be barred from refusing to register an applicant even when the State possesses concrete proof that the applicant is not a citizen. As that cannot be right, ITCA admits that a State would not "be forced to register a person even if it had 'absolute documented proof' extrinsic to the Federal Form, that an applicant was not a citizen." ITCA Br. 39 n.39. Their concession confirms that the NVRA does *not* prohibit States from verifying applicants' eligibility—even applicants who completed and timely submitted the Federal Form, showing eligibility on its face. In short, even according to the ITCA, a State can "accept and use" the Federal Form by receiving the form and employing it as a tool, but not the exclusive tool, to verify voter eligibility. That is precisely what Arizona does under Proposition 200.

Second, the upshot of the foregoing argument is that the NVRA does not override state methods of verifying eligibility so long as they are reasonable and are not on balance contrary to the purposes and objectives of Congress. This is confirmed by the EAC's regulations and practice with respect to other States.

Contrary to Respondents' assertions (*e.g.*, ITCA Br. 44), the Federal Election Commission (FEC) recognized that it lacked "rulemaking authority" to revise "specific state voter eligibility requirements." 59 Fed. Reg. 32,311, 32,311 (June 23, 1994). Also, the FEC concluded that the state-specific instructions "*shall contain* the following information for each state[:] . . . the *state's specific voter eligibility and registration* requirements." 11 C.F.R. § 9428.3 (emphasis added). Similarly, even though a voter identification number

was not, in the FEC's view, "necessary for determining the eligibility of an applicant," applicants would have to refer to the specific state instructions in order to determine what number may be required by that State. 59 Fed. Reg. at 32,313-14. The FEC did not understand the NVRA to preclude state requirements for registration or suggest that it had veto-like power over state eligibility and registration requirements.

And the EAC's own practice with the Federal Form confirms this approach. The EAC includes Louisiana's requirement that if a person lacks a qualifying identification number, "the applicant shall attach one of the following items to his application: (a) a copy of a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of applicant."[2] The EAC also includes Hawaii's registration requirement that an applicant provide a full Social Security Number. The instructions specifically state that "[f]ailure to furnish this information will prevent acceptance of this application."[3]

The Federal Form itself also undermines Respondents' argument that Proposition 200 interferes with the "postcard" nature of the form. Gonzalez Br. 42. First, the EAC informs applicants that they should "**[b]e sure** [to] **mail** [the Federal Form] **in an**

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[2] Form Instructions at 9, http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (last visited February 11, 2013).

[3] Form Instructions *supra* n.2 at 7.

envelope with the proper amount of postage."[4] Second, the Form instructions inform applicants that if they are interested in voting by mail for the first time in a federal election, they may enclose copies of identifying documents *with the Form*, as they are also required to by Louisiana under certain circumstances.[5]

In the end, therefore, Respondents' and the United States' arguments depend entirely on the EAC's then-director's legal conclusion that Proposition 200 conflicts with the NVRA. *See* ITCA Br. 46; U.S. Br. 20. But his statements are entitled to no weight in this context. *See Wyeth*, 555 U.S. at 576 (noting that the Court "ha[s] not deferred" to an agency's conclusion that a state law is preempted). And his conclusion is manifestly at odds with the statutory and regulatory framework of the NVRA and the EAC's rules.

It would be an odd rule, indeed, for preemption to arise from an agency official's mistaken conclusion that a federal statute prohibits application of a state law. In fact, under 42 U.S.C § 15328, "any action" taken by the EAC in furtherance of its statutory authority "may be carried out only with the approval of at least three of its members." Even the EAC itself, acting by a vote of three of its four members, could not preempt a state law because its powers are limited by 42 U.S.C. § 15329, and unlike other agencies (*e.g.*, 47 U.S.C.

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[4] Election Assistance Commission, Register to Vote, http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited February 11, 2013).

[5] Form Instructions *supra* n.2 at 1, 9.

§ 253(d) and 49 U.S.C. § 5125(d)), Congress did not grant the EAC the authority to preempt state law.

C. Proposition 200's Evidence-of-Citizenship Requirement Is Not an Obstacle to the NVRA's Purposes and Intended Effects.

1. The legislative history does not support respondents' position.

Respondents and the United States claim to have found evidence that supports their misreading of the NVRA in the legislative history, referring to the rejection of an amendment concerning documentary evidence of citizenship in conference committee. *E.g.*, ITCA Br. 41; U.S. Br. 28-30. But even the United States concedes: "Senator Ford, the bill's sponsor, objected to the amendment on the ground that, in his view, it was 'redundant' since *there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship*." U.S. Br. at 30 n.6 (quoting 139 Cong. Rec. 5099) (emphasis added). The United States argues that "there is no indication that other members of Congress shared his interpretation." *Id.* But there is also no indication that they didn't. The legislative history is ambiguous. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (noting that "*on the whole*" legislative history "was more likely to confuse than clarify" the meaning of a statute).

Furthermore, legislative history is only helpful if it explains something that is in the law, not something that is not in the law. If the point to be made is not

anchored in the actual text of the statute, this Court has held that it is entitled to no weight. *Shannon v. United States*, 512 U.S. 573, 583 (1994). Here, Respondents attempt to find meaning from a failed amendment.

And even if this committee report had been about something in the law and had been unambiguous, the committee reports support both sides of the issue. The House Report stated that "[t]he Committee is particularly interested in ensuring that election officials continue to make determinations as to applicants' eligibility, such as citizenship, as are made under current law and practice" and specified that "[a]pplications should be sent to the appropriate election official for the applicant's address in accordance with *the regulations and laws of each State*." H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993), *reprinted at* 1993 U.S.C.C.A.N. 105, 112 (emphasis added). Furthermore, the House Report specifically stated that "States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill." *Id.* at 113.

2. Respondents misrepresent the record as to crucial points.

Respondents also inaccurately attempt to counter Arizona's argument that Proposition 200 is not burdensome by including misleading record citations. Respondents' argument fails.

In the opening brief, State Petitioners pointed out that approximately ninety percent of voting age Arizonans have driver's licenses and could satisfy

evidence of citizenship by writing their driver's license number on a postcard registration form. Br. 19-20. In addition, naturalized citizens could write down their naturalization number. *Id.* That left very few who could provide evidence from any one of a number of documents listed. *Id.* This was important because in *Crawford*, this Court held, in the context of voter identification, that where there was a minimum burden on most voters, and a somewhat greater burden on a few, who had to get a photo taken and obtain the identification, this would not invalidate the law. 553 U.S. at 197-98. This Court stated that "burdens of that sort, arising from life's vagaries, are neither so serious *nor so frequent*, as to raise questions about the validity of the law. *Id.* at 197 (emphasis added). This Court also stated: "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198.

Respondent Gonzalez attempts to demolish this by stating that only voters under the age of 30 can use their driver's license, because the license had to be issued after 1996. Gonzalez Br. 19. The assertion is misleading as driver's licenses must be updated every twelve years. Ariz. Rev. Stat. (A.R.S.) § 28-3173. In addition, people who registered at the time of Proposition 200 were grandfathered, and naturalized citizens whose license record has an "F" (indicating that they obtained the license previously, when they were not citizens) can either write down their naturalization number or update their records.

Respondents also assert as facts selections from the district court trial on counts ranging from Equal Protection to a Voting Rights Act violation, without acknowledging that the district court found against them on those facts. (Gonzalez Br. at 18-25; ITCA Br. at 16).

The district court made the following factual findings:

> [E]ven if everyone prevented from registering by Proposition 200 as allowed to register, the percentage of the electorate that was Latino would only increase by 0.1%, and the difference in Latino turnout in the 2006 general election for Secretary of State would have been even less, 0.06% . . . Dr. Zax credibly testified that these differences were not nearly large enough to be statistically significant. This is especially true in light of the fact that the Passel-Word List, while a good estimate, is merely an estimator of Latino descent. Thus, when one considers the uncertainty as to the actual number of Latinos, minute differences of less than one-tenth of one percent are subsumed by the uncertainty associated with the original identification of who is and is not Latino.
>
> Thus, examining the facts as a whole, Proposition 200 does not have a statistically significant disparate impact on Latino voters. . .".

JA 307-08 (internal citations omitted).

Both Respondents claim that Proposition 200 "resulted in the rejection of 31,550 registration applications." ITCA Br. 16 n.17, Gonzalez Br. 18. If they were non-citizens, that is entirely in keeping with NVRA's "integrity" purposes. The burden of proof was on Respondents. The district court found against Respondents on this crucial fact. The district court found:

> Of approximately 20,000 voters ultimately unable to register to vote due to Proposition 200's proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it. See Crawford, 128 S. Ct. 1620. . . . They have only produced one person . . . who is unable to register to vote due to Proposition 200's proof of citizenship requirement. Nor have they demonstrated that the persons rejected are in fact eligible to register to vote.

JA 291-92.[6]

Likewise, Respondents did not produce evidence that Proposition 200 substantially burdened voter registration groups' First Amendment rights. JA 303. Indeed, voter registration witnesses testified that the measure did not have "a huge impact" (JA 275) and testified anecdotally to a handful of persons who did not have evidence "on their person" when registering

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[6] Ten thousand of those initially rejected did register. *Id.*

(JA 274, 279) or could not testify to knowledge of any person who lacked such evidence (JA 277). Additionally, there was a lack of documentary evidence that Proposition 200 increased voter registration costs. JA 274. Furthermore, the district court found there was no excessive burden on naturalized citizens or Arizonans at large. JA 291, 294.

The court also found that Arizona's voter fraud concerns and its interest in voter confidence were real: "Although an evidentiary showing of fraud is not required to find a government's interest in preventing voter fraud to be important . . . the Defendants demonstrated instances of voter fraud in Arizona." JA 294. The district court found from the evidence that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots . . . [a]s such, Plaintiffs' challenge must fail." JA 296.

Likewise, the court concluded that Plaintiffs' Equal Protection claim based on alleged discrimination against naturalized citizens failed. JA 301. The court also rejected their Section 2 of the Voting Rights Act claim, finding the following facts: "Plaintiffs have not adduced any evidence that the observed difference in voter registration and voting rates of Latinos is substantially explained by race, as opposed to factors independent of race." JA 315.

Because there is no conflict between the NVRA and Proposition 200, the court of appeals erred in holding that the NVRA preempts Proposition 200's evidence-of-citizenship requirement.

III. The Canon of Constitutional Avoidance Favors Arizona's Interpretation of the NVRA.

A. The Constitutional Issue Presented.

The Arizona Legislature has determined that any person who has not supplied evidence of citizenship is not qualified to vote in the election of the most numerous House of its Legislature. *See* A.R.S. § 16-121(A). The Constitution expressly assigns to the States the power to define and enforce the qualifications to vote in federal elections. U.S. Const. art. I, § 2, cl. 1; art. II, § 1, cl. 2; amendment XVII. It follows that Congress lacks the power to change that qualification.

Respondents argue that Congress derives its power from Article I, Section 4, which allows Congress to regulate the time, place, and manner of federal elections. But this Court has examined the constitutional history and determined that manner refers to "*how* these electors shall elect—whether by ballot, or by vote, or by any other way." *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 833 (1995). This is an issue of "qualification," not "manner." The "power of a State to pass laws [on voter qualifications] means little if the State cannot enforce" such laws. *Calderon v. Thomas*, 523 U.S. 538, 556 (1998) (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

B. The Canon Applies Here Because Arizona's Interpretation of the NVRA, Which We Believe to Be Correct, Is, at a Minimum, Plausible.

Under the canon of avoidance, when a statute is susceptible to "two plausible statutory constructions," one of which "would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). As Judge Kozinski, observed below, the NVRA is at least "readily susceptible" to the interpretation advanced by Arizona that avoids a conflict with Proposition 200. Pet. App. 89c (Kozinski, J., concurring).

This Court need not resolve the constitutional problems raised: "One of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381-82.

C. Interpreting the NVRA to Preempt Proposition 200 Raises Serious Doubts as to the Constitutionality of the NVRA.

1. Congress lacks the power to preclude Arizona from enforcing its qualification of citizenship.

Respondents and the United States agree that citizenship is a qualification but argue that Congress's power to regulate the "Manner of Holding the Election" allows it to preclude Arizona from enforcing that qualification. Gonzalez Br. 62; ITCA Br. 48-49; U.S. Br. 32-33. They argue, in effect, that Congress can require Arizona to trust applicants' claims of citizenship, in a kind of honor system that assumes that people who are willing to vote fraudulently would not be willing to sign falsely, and preclude Arizona from verifying such claims.

That cannot be right, because "'[t]he power of a State to pass laws means little if the State cannot enforce them.'" *Calderon*, 523 U.S. at 556 (quoting *McCleskey*, 499 U.S. at 491). Arizona has the unquestioned constitutional prerogative to make citizenship a qualification for voting, and that prerogative "cannot be manipulated out of existence" by Congress's preclusion of Arizona's attempt to enforce that qualification. *U.S. Term Limits*, 514 U.S. at 831 (internal quotation marks omitted). "[C]onstitutional rights would be of little value if they could be indirectly denied." *Id.* at 829 (internal quotation marks omitted).

2. This is an issue of "qualification" not "manner" because "manner" refers to voting, which occurs after the qualification process is completed.

Congress's power "over the manner [of holding the Election] only enables [Congress] to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way." *U.S. Term Limits*, 514 U.S. at 833 (quoting 4 *Elliot's Debates* 71 (Steele statement at North Carolina ratifying convention)). That is to say, in regulating the "Manner of holding the Election," Congress can regulate "the combined actions of voters and officials *meant to make a final selection of an officeholder*," including "'requirements as to procedure and safeguards'" related to the selection process. *Foster*, 522 U.S. at 71 & n.2 (emphasis added and quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Amicus Brief of the Center for Constitutional Jurisprudence presents historical evidence that the power to regulate "manner" was to prevent dissolution of the federal government by a State's not holding elections; that it was the power to prescribe the circumstances under which the elections shall be "holden," "not the qualifications of the electors, nor those of the elected"; that it extended only to the "when, where, and how" of elections; that it referred to mechanical matters such as paper ballot rather than voice vote and to the ability to choose by majority versus plurality vote requirement; and that it involves the power to compel representatives by district and to deal with gerrymandering. These all deal with the

mechanics of the actual election, rather than the qualifications of the electors prior to the election. *Id.* at 4-7.[7]

Merely registering to vote in Arizona, by contrast, does not involve any act involved in the "final selection of an officerholder." *Foster*, 522 U.S. at 71. Instead, under Arizona law, registration is itself a *qualification* to vote; persons otherwise eligible to vote in Arizona by virtue of age, citizenship, and residency are not qualified electors unless they are also properly registered. *See* A.R.S. § 16-121(A) (defining "qualified elector" as "[a] person who is qualified to register to vote pursuant to § 16-101 *and who is properly registered to vote* shall, if he is at least eighteen years of age on or before the date of the election, be deemed a qualified elector for any purpose for which such qualification is required by law") (emphasis added).

---

[7] This Court has stated on three occasions that Congress's Elections Clause power extends to regulating voter registration. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (citing *Smiley*); *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citing *Smiley*). Those statements—made in passing and without the benefit of full briefing on the question—are dicta, and do "not establish law and would not qualify as binding precedent." *Camreta v. Greene*, 131 S. Ct. 2020, 2045 (2011). These cases do not discuss "qualifications." Similarly, this Court's decision in *Siebold* did not address, much less uphold, Congress's power to regulate voter registration. In *Siebold*, this Court upheld as a valid exercise of Congress's power a federal statute allowing federal supervisors of election to monitor voting in congressional elections for fraud. *See id.* at 379-82. Although the same statute authorized federal officers to similarly monitor voting registration, that issue was not before the Court in *Siebold*.

Under A.R.S. § 16-121(A), when otherwise eligible persons register to vote, they become qualified electors, but do not take any act "meant to make the final selection of an officeholder"—that is participate in the "holding of the Election" that the Elections Clause empowers Congress to regulate under *Foster*—unless and until they actually vote.

Where a statute is susceptible of "two plausible constructions," one of which "would raise a multitude of constitutional problems, the other should prevail," *Clark*, 543 U.S. at 380-81. State Petitioner's interpretation is, at a minimum, "plausible." Respondents' interpretation raises a serious constitutional problem.

It is therefore respectfully submitted that, both on the merits and under the canon of avoidance, State Petitioner's interpretation "should prevail."

CONCLUSION

For the foregoing reasons, the State Petitioners requests that the Court reverse the Ninth Circuit's decision and remand for proceedings consistent with its Opinion.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 12-71

FILED
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In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE; AND BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

On September 26, 2012, a divided panel of the Fifth Circuit Court of Appeals filed its opinion in *Voting For America v. Andrade*, No. 12-40914 (unpublished). Supp. App. 1-80. The opinion, albeit unpublished and not intended to bind the Fifth Circuit on the merits of the matter (Supp. App. 31) nevertheless demonstrates that the Fifth and Ninth Circuits have developed vastly different tests for resolving conflicts between federal and state law under the Elections Clause.[1]

In *Andrade*, Plaintiffs challenged two Texas statutory provisions that they alleged the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg et seq., preempted. They challenged a provision that, in effect, requires Volunteer Deputy Registrars (VDRs), persons authorized by county officials to collect voter registration forms, to hand-deliver such forms (when completed) to county registrars by imposing criminal penalties for failure to do so. Tex. Elec. Code §§ 13.042, 13.043 (the Personal Delivery Provisions). Supp. App. 4. They also challenged a Texas statute that makes it illegal for VDRs to photocopy voter registration forms, which include a variety of personal information, Tex. Elec. Code § 13.038 (the Photocopying Provisions). Supp. App. 4.

---

[1] Although the *Andrade* case also deals with claims under the First Amendment (Supp. App. 15), the discussion in this brief is focused on the claims based on the NVRA and the Fifth Circuit's approach to them.

The district court granted Plaintiffs preliminary injunctive relief (Supp. App. 3), and Texas appealed to the Fifth Circuit. There a divided panel lifted the stay because "Andrade has made a strong showing that she is likely to prevail in showing that the Photocopying and Personal Delivery Provisions do not conflict with the NVRA." Supp. App. 25. The majority held that "federal law preempts state law in this area to the *extent of a conflict*." Supp. App. 25. The majority explained that "[m]uch like traditional Supremacy Clause preemption, conflicts with federal election regulations render state law inoperative." Supp. App. 13. "To this end, state laws cannot 'directly conflict' with federal election laws on the subject" Supp. App. 13 (quoting *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000)). Thus, for example, the majority concluded that the Personal Delivery Provisions do not conflict with the NVRA because "there is no actual conflict." Supp. App. 28-29 & n.25. The majority held that the NVRA simply does not address this issue. Supp. App. 28-29. Similarly, the majority held that the Photocopying Provisions did not conflict with the NVRA because the NVRA regulates the state government's maintenance of voter records and does not address a third party's right to copy documents that are not state records. Supp. App. 28.

The dissent, in contrast, would have denied Texas's stay request because it disagreed with the majority's approach to the NVRA under the Elections Clause. Supp. App. 76-78. Relying principally on the Ninth Circuit's opinion in *Gonzalez v. Arizona*, 677

F.3d 383 (2012) (en banc), the case that Petitioners seek review of before this Court, the dissent explained that "unlike preemption for ordinary laws under the Supremacy Clause, there is no presumption against preemption for state election laws that are contrary to federal election mandates." Supp. App. 70. Although the dissent claimed that *Bomer* and *Gonzalez* are of a piece with one another (Supp. App. 70-71), it nevertheless emphasized the *Gonzalez* court's test for determining preemption under the Elections Clause. Supp. App. 72. For example, the dissent would have held that the Photocopying Prohibition was preempted because it is "inconsistent and disharmonious with the NVRA public disclosure provisions," (Supp. App. 76) and would have held that the Personal Delivery Prohibitions conflicted with the NVRA's requirement that States "accept and use" the mail-in federal form because the NVRA did not draw a distinction between who may mail in such forms. Supp. App. 78.

I. The Fifth Circuit's Approach to the Election Clause Is Distinct from the Ninth Circuit's Approach and Only This Court Can Resolve the Conflict.

As is clear from the summary above, the Fifth and Ninth Circuits have adopted distinct approaches to assessing conflicts under the Elections Clause. While the Fifth Circuit, as indicated by the majority, seeks to determine if there is a "direct[ ] conflict" between federal and state law (Supp. App. 13), the

Ninth Circuit's heightened preemption test focuses on identifying alleged disharmony between federal and state law and grants preemptive scope to the extent of the disharmony. Supp. App. 76, 78.[2] This heightened approach to preemption has no basis in this Court's cases. *See* Petition at 15-22. Furthermore, the test adopted by the Ninth Circuit gives federal courts unwarranted authority to invalidate state laws. As the *Andrade* opinion illustrates, under *Gonzalez*, courts need not identify any textual basis for a preemptive conflict, but must merely find that the state law is not in "harmony" with one of the purposes of the federal statute in order to find the state law invalid. This is a strange sort of preemption test. It disregards both the express role of States with respect to federal elections and any ordinary conception of statutory construction.

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[2] Indeed, both the Voting Project Plaintiffs, as applicants for relief in this Court, and Texas agreed that the Fifth Circuit and Ninth Circuit have adopted distinct approaches to the Elections Clause. *See* Voting for America Emergency Application to Vacate the Fifth Circuit's Stay Pending Appeal, No. 12A266, at 29 (September 14, 2012) (on file with the Court); Texas Response to Emergency Application, No. 12A266, at 41 (September 20, 2012) (on file with the Court). This Court, after referral by Justice Scalia, ultimately declined to grant the Emergency Application, with Justice Sotomayor indicating that she would have granted the application in part. *See* Order No. 12A266 (September 25, 2012).

II. The Fifth Circuit's Opinion in *Andrade* Illustrates the Continuing Confusion that Reigns in the Circuits over the Elections Clause.

Notwithstanding the majority's statement "disclaim[ing] any intent to bind a subsequent merits panel" in *Andrade*, it is clear that both the majority and the dissent dealt expressly with the merits. The confusion among these three circuit court judges regarding what standard to apply will continue to be an issue in the federal circuits. As the States' Amicus brief in this matter detailed, already four states in three federal circuits have "enacted laws that are materially identical" to Arizona's, while some twelve other states have contemplated such laws. States' Amicus at 8-9. And this merely accounts for laws like Arizona's, not the range of other state laws that may now be open to challenge under the Ninth Circuit's standardless approach. Left untouched, the Ninth Circuit's heightened approach encourages federal litigation as interested parties seek to take advantage of the unpredictable standard announced by the Ninth Circuit.

CONCLUSION

Petitioners request that the Court grant their Petition for Certiorari.

Respectfully submitted,

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Voting For America, Inc. v. Andrade, No. 12-40914, slip op. (5th Cir. Sept. 26, 2012).....Supp. App. 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRTH CIRCUIT

No. 12-40914

VOTING FOR AMERICA, INC.; BRAD RICHEY; PENELOPE MCFADDEN; PROJECT VOTE, INC.,

Plaintiffs-Appellees

v.

HOPE ANDRADE,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
U.S. Dist. Ct. No. 3:12-CV-00044

(Filed Sept. 26, 2012)

Before SMITH, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:*

On September 6, 2012, we entered an order granting Appellant Texas Secretary of State Hope

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Andrade's[1] Emergency Motion to Stay the district court's Order (as modified) granting in part a preliminary injunction against the enforcement of certain Texas statutes and stating that reasons would be assigned later. Those reasons follow.

I. Background of Election Code Chapter 13

Like other states, Texas has a system by which citizens desiring to vote in elections must register with the state. *See generally* TEX. ELEC. CODE § 11.001 *et seq.* "To encourage voter registration," Texas has instituted a system whereby volunteers can be appointed as "volunteer deputy registrars" (VDRs) empowered to accept voters' applications to be registered. TEX. ELEC. CODE § 13.031 *et seq.* (hereinafter the "VDR Law"). This basic structure has existed for over twenty years in Texas, with little incident and almost no reported cases. However, in 2011, the Texas legislature amended the VDR Law to add certain requirements, including training of VDRs. TEX. ELEC. CODE § 13.047.

Appellant Hope Andrade is the Texas Secretary of State; in that capacity, she is charged with administering Texas's election laws.[2] Appellees Voting for

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[1] Although Cheryl Johnson, Galveston County Assessor was also sued in the district court, she did not file a notice of appeal.

[2] At this point, Andrade has not reasserted the standing issues she raised in the district court. Because standing is a component of federal subject-matter jurisdiction, we must examine it on our own. *Sommers Drug Stores Co. Emp. Profit*

(Continued on following page)

America, Inc., Project Vote, Inc., Brad Richey, and Penelope McFadden ("Appellees") state in their complaint that Richey and McFadden are individuals who have had difficulty both registering to vote in Texas and becoming VDRs; the two organizations have as their mission working to ensure that all eligible citizens register to vote. In response to the 2011 amendments of the Texas Election Code, Appellees contend that they made inquiries of Andrade regarding the meaning of certain provisions in the VDR Law. Unsatisfied with her response, they filed this lawsuit seeking a preliminary and permanent injunction against many of the provisions of the VDR Law, both old and new. After briefing and an oral hearing at which testimonial and other evidence was presented, the district court entered an Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction. The court then modified this order twelve days later and denied Andrade's motion for a stay pending appeal. *See Voting for Am., Inc. v. Andrade,* No. 3:12-CV-00044, Order Den. Mot. for Stay (S.D. Tex. Aug. 14, 2012). Andrade appealed both orders to this court and, in the interim, sought a stay of the district court's order which, in turn, enjoins enforcement of certain portions of the VDR Law.

Sharing Trust v. Corrigan, 883 F.2d 345, 348 (5th Cir. 1989). We conclude that the district court's analysis of standing is substantially correct, Appellees have standing to bring this case, and Andrade is at least *a* proper party to respond to it. *See Voting for Am., Inc. v. Andrade*, No. 3:12-CV-00044, 2012 WL 3155566, at *9-13 (S.D. Tex. Aug. 2, 2012).

We examine the order as modified as one unitary document.

Pertinent to this appeal, the district court enjoined enforcement of the following portions of the VDR Law:[3]

(1) that portion of Texas Election Code § 13.038 that prohibits VDRs from photocopying or other duplicating of voter registration applications submitted to the VDR but not yet forwarded to the county registrar (so long as no information deemed confidential under § 13.004 is included) (the "Photocopying Provision")[4];

(2) that portion of Texas Election Code § 13.042 that prohibits VDRs from sending in applications by United States mail (the "Personal Delivery Provision");

---

[3] For purposes of assessing this motion to stay, we examine only the preliminary injunction as modified on August 14, 2012. We note that Appellees challenge additional portions of the VDR Law, but we examine only those as to which enforcement was enjoined by the district court's order and as to which the current stay request pertains.

[4] Section 13.038 states: "A [VDR] may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person." Although this provision says nothing about photocopying, Appellees contend, and Andrade does not dispute, that Andrade has taken the position that VDRs are prohibited from photocopying forms they receive and, instead, are limited to transmitting such forms to the appropriate county official.

(3) that portion of Texas Election Code § 13.031(d)(3) to the extent it forbids non-Texas residents from serving as VDRs (the "Non-Resident Provision");

(4) that portion of Texas Election Code § 13.038 that prohibits VDRs appointed in one county from serving in another county (the "County Provision")[5]; and

(5) Texas Election Code § 13.008(a)(2) & (3) (the "Compensation Provision").

The task before this court is only to decide the emergency motion to stay, which we decided on an abbreviated briefing schedule and within a limited time (although we did hear oral argument, conducted on shortened notice). The question we address, then, is whether, while the appeal is pending, Texas can enforce the entirety of the VDR Law or whether it is proscribed from enforcing the sections outlined in the

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[5] Section 13.038, quoted in footnote 4, *supra*, does not have an express "county-by-county" limitation. Once again, however, the parties seemingly agree that Andrade construes the appointment of a VDR to be limited to the county in which the appointment is made. We note that this interpretation is supported by the language of Section 13.033 which contains the precise wording of the appointment document, including a statement that the county registrar "do[es] hereby appoint ___ as a [VDR] for ___ County," suggesting that the powers granted by appointment are limited to that county alone. TEX. ELEC. CODE § 13.033. This section has been the law for over twenty years, yet it has sparked no reported decision.

district court's injunction. We disclaim any intent to bind a subsequent merits panel.

It sometimes takes time to decide a question, but, meanwhile, time itself does not "stand still." *Nken v. Holder*, 556 U.S. 418, 421 (2009). "A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Id.* Before addressing the merits of the stay motion, we must first examine the applicable standards.

II. Standards For Granting a Stay

The standards for granting a stay pending appeal are well-established: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Nken*, 556 U.S. at 426. Such a stay is a matter of judicial discretion, not a matter of right.[6] *Nken*, 556 U.S. at 433. The factors to

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[6] The district court's denial of a stay of judgment pending appeal is generally reviewed for abuse of discretion. *See Beverly v. United States*, 2d 732, 741 n.13 (5th Cir. 1972). This is an appellate standard of review, rather than an independent application of the factors relevant to a motion for a stay, as is presented here. Nonetheless, "a district court necessarily abuses its discretion if its conclusion is based on an erroneous

(Continued on following page)

be considered in deciding whether to stay an order pending appeal are virtually the same as the factors used by a court in deciding whether to issue a preliminary injunction.[7] Thus, we have here the somewhat circular situation of deciding whether there is irreparable harm to Andrade in part by analyzing the likelihood of success on the merits by Appellees of showing irreparable harm to them.[8] This analysis plays out against a backdrop of impending November 6, 2012, elections for which the voter registration deadline in Texas is October 9, 2012.

In this case, both sides cloak themselves in the mantle of irreparable harm – Andrade, because all the ills that gave rise to the need for the VDR Law can occur in connection with voter registration for the

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determination of the law." *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 425 (5th Cir. 2006).

[7] In granting a temporary injunction, the district court must weigh four factors: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an inunction will not disserve the public interest." *See, e.g., Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

[8] The dissenting opinion takes issue with this statement but, unquestionably, in the ultimate appellate review of the district court's decision, our court will have to examine whether Appellees met their burden to show irreparable harm in order to sustain the preliminary injunction. Whether Andrade is likely to succeed in showing that Appellees did not meet that burden is one question before us in the context of this emergency stay motion.

upcoming election, while Appellees counter that they will be prevented from fully implementing their large-scale voter registration drive efforts in connection with the same election. In one corner, Appellees valiantly champion the need to both encourage and facilitate citizens in registering to vote, a noble tradition in our country. In the other corner, Andrade agrees with this need, but is concerned about protecting the integrity of the registration process from harms of fraud or error, and from people who might seek to disenfranchise those with whom they disagree. Both sides claim the public interest supports them and that their prospective harm is greater than the harm to the other. While this panel rules only on the immediate motion to stay the district court's injunctive order pending appeal, the analysis under these circumstances centers on the likelihood of success on the merits. We turn to that question first.

III. Discussion

A. Standards Applicable to the Merits

The Supreme Court has expressly countenanced "substantial regulation of elections" to avoid "chaos," even as it has protected important rights, such as petitioning the government. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (internal citation and quotation marks omitted). Thus, a state has a substantial interest in protecting the sanctity of the voting process through regulation, even as it

provides for the basic constitutional protections afforded to the political process.

Appellees made two basic challenges to the various sections of the VDR Law: violations of the First Amendment of the United States Constitution and violations of the National Voter Registration Act ("NVRA"), 42 U.S.C. §§ 1973gg *et seq.* Specifically, they contend that their right to engage in voter registration activities is "expressive" in nature, such that limitations upon it abridge Appellees' First Amendment rights. Relevant to this motion to stay and the underlying appeal, the district court grounded its preliminary injunction against enforcement of the Non-Resident, County, and Compensation Provisions in First Amendment jurisprudence. It based the injunction against the Personal Delivery Provision and the Photocopying Provision upon the premise that they violate the NVRA. We examine each in turn.

Turning to the constitutional analysis, while not a model of clarity, it appears that Appellees make a facial challenge to the particular provisions, a very high hurdle.[9] *See, e.g., United States v. Robinson*, 367

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[9] At oral argument Appellees conceded that the challenge to the statute was facial, likely because there are insufficient factual allegations in the record to establish the Appellees' individual harm for an as-applied challenge. The dissenting opinion suggests that it does not matter whether the challenge is facial or "as-applied." It matters a great deal here because the district court – rather than attempting to construe statutes so as to make them lawful – accepted hypothetical scenarios Appellees

(Continued on following page)

F.3d 278, 290 (5th Cir. 2004) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). They cite to no application or threatened enforcement of any provision relevant only to the Appellees, or causing substantial detriment particular to their specific interests.[10] Instead, they broadly challenge the relevant provisions as unconstitutional.

Our task as a federal court is, to the extent possible, to construe the provisions to avoid a constitutional conflict. *See, e.g., Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). A federal court should not lightly enjoin the enforcement of a

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posited to enjoin these laws. In an "as-applied" challenge, Appellees could point to some specific situation the district court, and this court in review, could examine. Very little in the way of hard facts – rather than rumor and vague "fears" was actually presented to the district court. Appellees' concession thus makes sense.

[10] Appellees' witness Michael Slater testified that he was not aware of any prosecutions of voter registration drive participants in Texas. Indeed, he testified that his organization conducted a successful large-scale voter registration drive in Harris County, Texas, in 2008 and that the impact of the amendments to the VDR law were "unknown." Testimony of Appellees' witness Estelle Holmes, a VDR in Galveston County, indicated that she was not aware of any instance where the laws have created concrete problems preventing third-party voter registration.

state statute. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). The determination of whether a democratically enacted statute is constitutional on its face requires that "every reasonable construction must be resorted to [] in order to save a statute from unconstitutionality." *National Federation of Independent Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2594 (2012). In this vein, Andrade's interpretation must be accorded some meaningful weight, as she is the official charged with enforcing the statute. *See Bellotti v. Baird*, 428 U.S. 132, 143 (1976). We defer to her interpretation of how the law is to be enforced, so long as it does not conflict with the statutory text. *See Hamer v. Musselwhite*, 376 F.2d 479, 481 (5th Cir. 1967) (deferring to the city's interpretation of an ordinance because city officials are charged with enforcing the statute and are the ones who must apply it).

Most constitutional analyses of a statute begin with an examination of the degree of scrutiny a statute will receive. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (describing three "traditionally expressed levels" of scrutiny: "strict scrutiny, intermediate scrutiny, [and] rational basis"). Strict scrutiny, the most severe test, is applied to "core political speech," described as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Importantly, simply labeling a challenge as one under constitutional guarantee such as free speech does not make strict scrutiny applicable. *See, e.g., United States v. Marzzarella*, 614

F.3d 85, 96-97 (3d Cir. 2010) ("[T]he right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." (internal citations omitted)). The district court appeared to apply "intermediate scrutiny,"[11] reasoning that all aspects of the voter registration process are "expressive" in nature, thus implicating First Amendment rights and requiring (at least) intermediate scrutiny under *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). *See Andrade*, 2012 WL 3155566, at *19-23. Under this test, state election codes regulating voter registration may burden an individual's right to vote and to political association, but only to the extent justified by the State's legitimate goals. *Anderson*, 460 U.S. at 788; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 429 (1992) ("[T]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)). Alternatively, if the conduct is found to be non-expressive and therefore unprotected, the statute will be scrutinized for its

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[11] We have defined "intermediate scrutiny" in the First Amendment arena as follows: "[W]e . . . sustain the provisions [under intermediate scrutiny] if they further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir. 2012) (internal citation and quotation marks omitted).

"rational basis." *See Heller,* 554 U.S. at 628 n. 27 (if the law does not implicate a specific constitutional rights, such as freedom of speech, then rational basis review applies).

In examining the claimed violations of the NVRA, we must analyze whether the challenged provisions of the VDR Law conflict with the federal statute such that the NVRA preempts the contrary state provision. Though states generally bear responsibility for the mechanics of congressional elections, Congress may act to preempt state legislative choices. *See Foster v. Love,* 522 U.S. 67, 69 (1997). Much like traditional Supremacy Clause preemption, conflicts with federal election regulations render state law inoperative. *See Ex parte Siebold,* 100 U.S. 371, 384 (1879). To this end, state laws cannot "directly conflict" with federal election laws on the subject. *Voting Integrity Project, Inc. v. Bomer,* 199 F.3d 773, 775 (5th Cir. 2000). However, when confronted with two possible interpretations of state law, the court has "a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005).

B. Likelihood of Success on the Merits

1. County and Non-Resident Provisions

We conclude that Andrade has presented a strong likelihood of success on the merits in that the district court incorrectly applied these standards in the order it issued. We turn first to the County Provision and

the Non-Resident Provision, both of which, as pertinent here, apply only to the question of who may be appointed as a VDR and empowered to physically receive a completed voter registration application from a potential voter and transmit it to the proper county official.

The First Amendment protects political expression manifested through conduct, as well as speech. *See Johnson*, 491 U.S. at 406 (holding that the burning of an American flag is conduct "sufficiently imbued with elements of communication to implicate the First Amendment" (internal citation and quotation marks omitted)). To determine whether particular conduct possesses sufficient "communicative elements" to fall under the First Amendment, courts look to whether there was "[a]n intent to convey a particularized message" and whether "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404 (internal citations omitted).

All parties agree that the primary act of simply encouraging citizens to vote constitutes core speech and would be protected under the First Amendment. State restrictions on this activity would be analyzed under the lens of strict scrutiny, under which the state would have to advance a compelling justification for its regulation. Concomitantly, we have recognized that states have a compelling interest in protecting citizen's rights to vote. *Schirmer v. Edwards*, 2 F.3d 117, 121 (5th Cir. 1993) (upholding limits on electioneering within a certain distance from a polling place).

No one contends that Appellees have been prevented from actually speaking to anyone about voting; at best, they have made an argument that their "expressive conduct" is being restricted. Importantly here, Andrade has repeatedly asserted that she does not and will not seek to enforce the VDR Law to prevent any individual or organization from freely handing out voter registration applications and encouraging citizens to vote. The district court accepted these representations for purposes of its analysis, so we do as well. Thus, the focus of the VDR Law as enjoined by the district court is not on whether a party may encourage another to register to vote, but whether a private party can actually receive the prospective voter's completed registration application and handle it in some way. In essence, they contend a First Amendment right not just to speak out or engage in "expressive conduct" but also to succeed in their ultimate goal regardless of any other considerations.[12]

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[12] Here, that ultimate goal is a laudatory one of having citizens vote. But First Amendment protections exist not just for speech that may be noble but also for speech that is not. The Court's discussion in *Meyer*, 486 U.S. at 421, of the rights of parties to "select what they believe to be the most effective means" to advocate a cause cannot be seen as embracing an "anything goes" philosophy for any conduct that may relate in any way to speech or expression. Moreover, the argument that Appellees' expressive activity, here the promotion of voter registration, is contingent on the "success" factor of *actually registering voters* is a novel interpretation of First Amendment doctrine. While the First Amendment protects the right to have and express political views, nowhere does it protect the right to

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Appellees contend, and the district court accepted, that *all* aspects of a voter registration drive are "expressive conduct" protected by the First Amendment.[13] We perceive a significant distinction between

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ensure those views come to fruition. In this context of voter registration, a goal all parties here support, expansive protection would appear harmless. However, applied in other contexts, where the underlying speech is less universally accepted, the effects of such a rule prove otherwise. Imagine for example, the opposite situation, where an organization's goals are to *discourage* voting and voter registration. Again, the First Amendment protects the expression of such views. But freedom of expression cannot be used to protect that group's "right" to successfully achieve its expressive goals of preventing others from voting by throwing the registration cards away.

Appellees also rely on *Meyer* (and the later Supreme Court case of *Buckley*) to urge that the VDR Law has "the inevitable effect of reducing the total quantum of speech," limiting "the number of voices who will convey [Plaintiffs'] message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach." 486 U.S. at 422. This argument simply does not apply. No party argues that the law prevents anyone, regardless of domicile or VDR appointment, from passing out registration forms and encouraging others to vote. The size of the audience remains the same, and the "total quantum of speech" is unaffected. While affirming the striking down of some provisions of Colorado law in *Buckley*, the Court recognized an "important interest" of the state in protecting the integrity of the ballot initiative process there at issue and in deterring fraud. 525 U.S. at 204-05. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), discussed by the dissenting opinion here, addressed a ban on political speech based upon the identity of the speaker as a corporation; that issue is not before us.

[13] At oral argument, Appellees urged the court to draw a close parallel to the Supreme Court's reasoning in *Meyer*, 486 U.S. at 422, finding that the circulation of initiative petitions

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voter registration activity that urges citizens to vote (constituting protected expressive conduct, allowed without regulation by the VDR Law as considered by the district court), and the activity of collecting completed applications and submitting them to the government on behalf of voters (non-expressive conduct, permissibly regulated by the VDR provisions). Because different legal principles apply to these two discrete actions, it is important to assess regulations on each separately. *See Planned Parenthood v. Suehs*, ___ F.3d ___, 2012 WL 3573642, at *4 (5th Cir. 2012) (reviewing a temporary injunction that impermissibly grouped state regulations on promotion of abortion with the right to affiliate with other pro-choice supporters).

We conclude there is nothing "inherently expressive" about receiving a person's completed application and being charged with getting that application to

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was a matter involving the core political speech rights of the circulators under the First Amendment. The analogy is improper. The circulation and submission of an initiative petition is closely intertwined with the underlying political ideas put forth by the petition. The *petition itself* is the protected speech. Moreover, the very nature of a petition process requires association between the third-party circulator and the individuals agreeing to sign. In the voter registration context, the underlying expressive conduct (encouraging democratic participation and voting) does not implicate a third-party's right to process the application. Voter registration applications are individual, not associational, and may be successfully submitted without the aid of another. Here, the actual expression is not being limited.

the proper place.[14] *See Rumsfeld v. Forum for Academic & Instituitonal Rights, Inc.*, 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive."). No circuit court has held that the actual receipt and delivery process is, itself, entitled to First Amendment protection.[15] District courts that have held as the district court did here fail to apply the discerning regulation-by-regulation analysis we most recently employed in *Suehs*. *See League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006)

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[14] Appellees do not contend that they should be free to receive a completed application from a prospective voter and throw it in the trash. Implicitly, if not explicitly, they concede the importance of making sure this process is handled carefully and without fraud or malfeasance.

[15] The Eleventh Circuit affirmed a district court's preliminary injunction enjoining a Georgia voter registration statute, which rejected voter registration forms submitted to the state in a single mailed package. *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005) (finding the "associational and franchise-related rights asserted . . . were threatened with significant, irreparable harm . . . without question in the public interest.") However, this case is easily distinguishable because in applying its "anti-bundling" provision, Georgia refused to accept the wrongfully submitted applications, thus impermissibly depriving the applying voters of franchise. The Texas code only operates to penalize VDRs who do not submit applications according to statute, while still accepting a voter's timely application in compliance with the NVRA. Moreover, although the petitioners in *Cox* alleged First Amendment violations, neither the district court nor the 11th Circuit addressed any constitutional rights concerning the receipt and submission of voter registration applications.

(finding certain requirements imposed on third-parties who collect registration forms unconstitutional as "reducing the quantum of political speech"[16]); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 699 (N.D. Ohio 2006) (applying intermediate scrutiny to all aspects of third-party registration laws); *see also American Association of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1200 (D.N.M. 2010) (finding that the plaintiff's generalized third party voter registration activity implicated expressive conduct because it was intended to "convey a message that voting is important"). The courts broadly considered voter registration activities as protected activity generally, instead of drawing distinctions between the

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[16] One key difference between the Florida statute at issue in *Cobb* and the Texas VDR Law is that the Florida statute discriminated against non-political party organizations. *Cobb*, 447 F. Supp. 2d at 1335. An appeal of the district court's decision was dismissed as moot after Florida substantially amended its statute. *League of Women Voters of Fla. v. Browning*, 2008 U.S. Dist. LEXIS 108147, at *5 n.3 (S.D. Fla. 2008). Thereafter, that district court declined to enjoin enforcement of the amended law. *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1325 (S.D. Fla. 2008). Several years later, a different district court in Florida preliminarily enjoined enforcement of a still further amended statute that contained a "48-hour" requirement for turning in applications and which the court construed as a prohibition of use of the mails. *League of Women Voters of Fla. v. Browning*, ___ F. Supp. 2d ___, No. 11-628, 2012 WL 1957793 (N.D. Fla. May 31, 2012). Importantly, there, the state claimed no interest in prohibiting third-party registrants from using the mails. *Id.* at *6. Thus, the arguments presented here were not addressed.

type of conduct and type of regulation at issue. Thus, we find their analyses unpersuasive.

Because we conclude that the physical receipt and delivery of completed voter registration applications are not "expressive conduct" as separately analyzed and are not "part and parcel" of the expressive conduct, we employ rational basis scrutiny to the County and Non-Resident Provisions. With respect to the Non-Resident Provision and the County Provision, Andrade justifies these requirements on the theory that local control over people entrusted with these applications is an important and necessary safeguard in preventing fraud and improper handling of such applications. While we cast no aspersions on the parties before us, we recognize that without some regulation, out-of-state individuals could descend upon Texas before the voter registration deadline, engage in unlawful and fraudulent registration practices, and then leave the state before action could be taken against them. Importantly, Appellees' own witness (Executive Director of Project Vote, Michael Slater) eschewed any desire to have the voter registration drives run entirely by those from out-of-state, dismissing the practice of "parachuting in" by out of state individuals.[17] He emphasized that registration drives are much more effective when conducted by locally-recruited personnel. Requiring that VDRs be

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[17] Mr. Slater was asked, "What is your opinion about parachuting in, is that an effective way to do things?" He answered: "No, it's not an effective way to do that."

residents of Texas enables law enforcement officials to more readily find and hold accountable those who engage in unlawful practices. As such, Andrade has demonstrated a rational basis for these laws.

Appellees suggest (and the district court and dissenting opinion appear to accept) that these provisions will prevent non-resident volunteers from participating in voter registration drives. Nothing in the statute or record indicates that non-resident volunteers will be prohibited from participating in voter registration activities in a non-VDR capacity. Indeed, Andrade has made it clear that the act of passing out voter registration applications or otherwise encouraging voter participation may be performed by any individual. National "get out the vote" campaigns can still operate in Texas largely unchanged, provided there are properly appointed resident VDRs involved to facilitate any activities that only VDRs are empowered to do (namely the receipt and transmission of the completed application).[18] No evidence was presented that "get-out-the-vote" efforts actually have been unable to operate prior to or after the amendments to the VDR Law. Indeed, Appellees' witness was unaware of the effects of the VDR Law on other groups' voter registration efforts in Texas, only vaguely stating that they have

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[18] When given the chance to actually submit facts to support his concerns about Texas, Slater had little to offer beyond the bare conclusion that it is "too difficult" to conduct voter registration drives in Texas.

not told him they are conducting drives. We conclude that Andrade has made a strong showing of the likelihood of succeeding on appeal in showing that the County and Non-Resident Provisions meet this threshold.

2. Compensation Provisions

With respect to the Compensation Provisions, we agree that these provisions encompass some expressive conduct rather than merely the receipt and delivery of completed voter registration applications. *Cf. Meyer*, 486 U.S. at 428 (striking down a Colorado law prohibiting payment of petition circulators). Thus, we assume without deciding that intermediate scrutiny applies to the compensation provisions. Andrade explains that these provisions are designed to avoid placing paid "volunteers" in the position of having to meet particular number or quota requirements in their registration efforts. The incentives for fraud in a quota system are obvious, as Appellees implicitly concede, and Appellees do not even wish to pay their "volunteers" on a quota or numerical basis.[19] Instead, they speculate that they will be unable to hire and fire people who fail to perform properly because they may run afoul of the Compensation Provisions.[20] We conclude that rather than construing

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[19] Slater admitted that paying "volunteers" for each registration encourages fraud.

[20] Appellees presented expert testimony to the effect that low paid "unskilled workers," such as those they would hire to

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these provisions to find them constitutional, particularly important in a facial challenge case, the district court accepted Appellees' proffer of speculative and imagined circumstances that might make the provisions unconstitutional as applied to a hypothetical situation. *Project Vote v. Kelly,* 805 F. Supp. 2d 152 (W.D. Pa. 2011) (declining to strike down laws regulating compensation of voter registration "volunteers"); *cf. Preminger v. Peake,* 552 F.3d 757, 766 (9th Cir. 2008) (holding that Veterans Affairs office's proffered reason of protecting patient trust as a basis denying partisan voter registration activities in its facilities was a "reasonable rationale").

As discussed above, Appellees did not expressly explain whether this challenge is facial or "as-applied" in their brief. If facial, as conceded at oral argument, Andrade has made a strong showing that the challenge will fail because these sections can apply constitutionally to proscribe quota or numerically-based compensation situations that all agree are a recipe for fraud. The State has a legitimate interest in preventing fraud. *Buckley,* 525 U.S. at 204-05. This provision was enacted in part to rectify problems with the previous law that enabled an incentive for fake voter registration applications such as those made through the Project Vote scandal, where employees

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engage in voter registration outreach, need goals in order to be motivated to work. The expert witness admitted having no actual knowledge of voter registration work or employees who work in that field.

were paid $1.00 for each voter registration application received. Staff of the House Comm. on Oversight & Gov't Reform, 111th Cong. (Feb. 18, 2010); *see also* Comm. Rep. HB 239, 82d Leg. (Tex. 2011) ("In many of the scandals, the convicted individuals specifically cited compensation or performance quotas as the incentive to fraudulently complete voter registration forms."). The district court discounted this rationale because Texas's provisions are stricter than other states, and found there was no indication that Texas voter registration efforts are more susceptible to fraud. *Andrade,* 2012 WL 3155566, at *6-7, 32. However, Texas has a legitimate interest in protecting against voter fraud.

Even if this challenge were an "as-applied" challenge, Andrade has made a strong showing that it is likely to fail because Appellees have not shown that they actually have been prevented or hindered by this statute from hiring "volunteers" and firing them if they fail to perform properly. Unlike the cases cited by the district court, *see, e.g., Citizens for Tax Reform v. Deters,* 518 F.3d 375, 377 (6th Cir. 2008),[21] the VDR Law does not require third-party organizations to pay only by hourly wage or limit their ability to discharge or reward employees, it merely limits Appellees from using a quota-based metric in isolation to evaluate

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[21] The Ohio code at issue in *Citizens for Tax Reform* stated "No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked." 518 F.3d at 377.

performance. The hypothetical circumstance where Appellees fire an employee who simply sat at a table and did nothing to engage passers-by or encourage them to vote and then are charged with violating the Compensation Provisions is just that, hypothetical. As such, an "as applied" challenge rests on a faulty premise.[22]

3. Photocopying and Personal Delivery Provisions

Turning to the alleged NVRA violations, we agree with Appellees that federal law preempts state law in this area *to the extent of a conflict*. We conclude, however, that Andrade has made a strong showing that she is likely to prevail in showing that the Photocopying and Personal Delivery Provisions do not conflict with the NVRA. The NVRA mandates that "[e]ach State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs

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[22] The district court made no specific findings of fact with respect to particular harm to Appellees, stating only: "Plaintiffs presented a significant amount of testimonial and documentary evidence detailing how the challenged provisions of the Election Code prevent them from conducting effective voter registration activities in Texas." *Andrade*, 2012 WL 3155566, at *33. We cannot give deference to such conclusory findings of fact, particularly in light of the actual evidence presented to the trial court which provided little in the way of detail or facts underlying the broad conclusions reached.

and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 42 U.S.C. 1973gg-(6)(i). Texas law as interpreted by the Secretary of State prevents third-party facilitators from photocopying applications before they are processed by the State. Appellees contend that they are copying a "public record" when they photocopy completed voter registration applications in their possession and that, therefore, the Photocopying Provision violates the NVRA. Texas Election Code § 13.038 states that a VDR "may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person." Though this provision does not explicitly prohibit photocopying, Andrade interprets this provision to limit VDRs to collecting and properly delivering applications, thereby impliedly precluding photocopying.[23]

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[23] Whatever the salutary purpose of the photocopying (as discussed in the dissenting opinion), the question is whether the Photocopying Provision conflicts with the NVRA, not whether it is a good idea. We note, however, that Slater testified that the photocopies are kept "forever" on a database, and he does not know how secure the database is. Appellees state that they redact sensitive information such as drivers' license or social security numbers if required to do so by state law before copying. While we do not question their sincerity, we note that it is not unreasonable for the State to require parties to obtain public government records from the government, which can then make sure that appropriate redactions occur before the records are released.

While nothing in the Texas Election Code precludes public inspection of properly submitted voter registration applications, including those submitted by VDRs, Texas law, as construed by Andrade, prevents *pre*-submission photocopying. The NVRA pertains to state-maintained registration records, requiring states to make records available for public inspection and photocopying for two years after submission and processing. The VDR is "deputized" only to receive and transmit completed applications, not to "maintain" them for the state. TEX. ELEC. CODE § 13.038. The state and federal provisions do not conflict.

Project Vote/Voting for America, Inc. v. Long, 682 F.3d 331 (4th Cir. 2012) is not to the contrary. That case specifically addressed records in the government's possession, rather than in the hands of VDRs. Indeed, the NVRA only applies to records "maintain[ed]" by the State. The district court's allusion to the State's constructive possession through VDRs is not based upon any statute, state or federal, and the statute does not permit VDRs to "maintain" the applications.[24] *Andrade*, 2012 WL 3155566, at *17. The entire purpose of § 1973gg-(6)(i) is to facilitate public inspection of public records, and possession by a county-appointed VDR, perhaps one of hundreds in a given county, does not equate to a public record. Moreover, precluding photocopying until the applications

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[24] To the contrary, they must deliver them to the county registrar within five days. TEX. ELEC. CODE 13.042(b).

have changed hands is not mere "administrative chicanery," but protects voter privacy. The Fourth Circuit highlighted that fact, noting that social security numbers may be redacted from applications processed by the State before being "ma[d]e available" to the public. *Project Vote*, 682 F.3d at 339. This additional privacy protection is unavailable where the State has not yet received the applications. We agree with Andrade that, until these applications are actually received by a government official, they are not "public records maintained" by the State. Accordingly, there is no conflict between the NVRA and the Photocopying Provision.

The NVRA also requires that applicants be able to use the United States mail to forward their registration to the appropriate officials. The Personal Delivery Provision of the Texas statute is not to the contrary, as it does not address whether the prospective voter can mail an application or not, instead limiting a third-party (the VDR) who has agreed to deliver the application for the voter from doing so. Texas law requires an appointed VDR accepting voter registration applications to deliver the forms in person to the county registrar. *See* TEX. ELEC. CODE § 13.042.

Again, the two laws do not conflict.[25] The NVRA simply does not address the use of mails by third-parties

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[25] Rather than trying to construe the state and federal laws in harmony, the dissenting opinion finds a conflict in that VDRs cannot use the mails. However, the NVRA does not address

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to submit applications. Section 1973gg-4 requires states to "accept and use" a federal mail-in voter-registration application. Texas law requires in-person delivery of forms by VDRs to promote accountability and foreclose the excuse of "lost" applications in the mail. Texas is understandably concerned with parti- a third-party VDRs potentially motivated to discard applications thought to be adverse to their political leanings.

Importantly, Texas law requires county registrars to accept every voter-registration form that arrives through the mails. *See* TEX. ELEC. CODE §§ 13.071-.072. This includes applications sent through the mails by VDRs in violation of state law. Texas, therefore, "accepts and use[s]" every federal mail application, while penalizing VDRs for using the mail to submit other people's applications. As a result, individuals in Texas may, in every circumstance, send their applications through the mail. This promotes voter turnout and ease of registration. Texas's VDR provisions accomplish a similar goal, albeit based in a third-party regime. This law does not conflict with the NVRA's provision for mail-in applications because individuals may mail their applications in; VDRs may not.

This element of the VDR Law distinguishes it from the law considered by the Eleventh Circuit in

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whether third-parties to the registration process must be permitted to use the mails. Thus, there is no actual conflict.

Cox, 408 F.3d at 1354-55. The state argued there that the NVRA only requires mailed registration be accepted where the mailing met additional state requirements and that the state may regulate the method of delivery. *Id.* The court rebutted this assertion, however, stating that the NVRA "simply requires that valid registration forms delivered by mail and postmarked in time be processed." *Id.* at 1354. Unlike the law analyzed there, Texas law would have undisputedly required acceptance of forms sent in contravention of state law. In this way, Texas has established anti-fraud provisions by penalizing nonconforming VDR conduct, yet explicitly set out to comply with the NVRA by accepting applications despite any noncompliance with state law. Again, no conflict.

We thus conclude that Andrade has made a strong showing of likelihood of success on this appeal. Where a lawful statute is enjoined, the state suffers irreparable harm by its injunction and the public interest lies in the enforcement of state laws. *See Maryland v. King*, 2012 U.S. LEXIS 5018, at *3 (2012) (Roberts, as Circuit Justice, in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, as Circuit Justice, in chambers); *Coalition for Economic Equality v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). While each side can claim harm regardless of how we rule,[28] we conclude

[28] The dissenting opinion focuses on harm to Appellees' "business model" from the Texas restriction. For example,

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that the balance of harms favors Andrade in light of the great likelihood of success on the merits. Accordingly, she is entitled to a stay pending appeal.

Although we have, of necessity, addressed the merits of this appeal in our analysis, we again caution that our ruling does not bind the subsequent merits panel addressing this appeal, and we disclaim any intent to do so. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997).

Accordingly, as we ruled by order of September 6, 2012, the Emergency Motion for Stay is GRANTED, and the district court's injunction orders are STAYED until the final disposition of this appeal.

Appellees want to copy applications so they can "follow up" with potential voters. However, they put on no evidence in the district court that they are prevented from obtaining information from potential voters by simply asking them for follow-up contact information such that they can contact the potential voter by the means most efficacious for that voter (mail, e-mail, telephone, or some other means). The dissenting opinion also catalogs perceived harms caused by various provisions of the law not at issue here. For example, the dissenting opinion describes the five-day delivery period requirement of § 13.042(b) as burdensome, although this provision was not enjoined beyond the "personal delivery" portion. Additionally, this provision has been in place for over twenty years, yet Slater admitted that his organization conducted a "successful" voter registration drive in Harris County, Texas in 2008, registering 23,000 voters, apparently finding it possible to comply with this law.

DENNIS, Circuit Judge, dissenting.

I respectfully dissent from the majority's stay of the judgment of the United States District Court for the Southern District of Texas enjoining the Texas Secretary of State from applying five provisions of the state election code against the plaintiff nonprofit voter registration and voting organizations. Because the majority completely disregards and fails to apply the Supreme Court's standards governing a court of appeals' issuance of a stay of a lower court's judgment, it erroneously grants the Secretary's motion to stay the district court's judgment pending her appeal.

The plaintiffs in this action are nonprofit voter registration and voting organizations that seek to assist African-American and Latino citizens in Texas in registering to vote and voting in the upcoming federal elections. The complaint alleged that the Secretary's enforcement of Texas Election Code provisions will prevent them from engaging in their chosen, effective methods and practices for assisting and encouraging citizens to register and to vote. After a full hearing, the district court issued a preliminary injunction enjoining the enforcement of five provisions of the state election code, *viz.*, the requirements that persons providing such assistance must be residents of Texas and appointed in the particular county in which each assisted citizen resides; that assisters personally deliver to registrars all completed voter registration applications obtained within five days; that assisters must refrain from copying or retaining copies of the completed applications; and

that assisters may not be compensated in any way tied to the number of completed applications they submit. The district court held that the residency, in-county, and compensation provisions were unconstitutional on First Amendment grounds; and held that the bans on photocopying and mail-in submissions were preempted by the National Voter Registration Act (NVRA). The district court refused to stay its injunction, and the Secretary appealed and sought a stay from this motions panel.

I. Standards Governing the Issuance of Stays

The standards governing the issuance of stays are well established. As the Supreme Court explained in *Nken v. Holder,* 556 U.S. 418 (2009), "[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. The fact that the issuance of a stay is left to the court's discretion does not mean that no legal standard governs that discretion. A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Id.* at 433-34 (internal quotation marks, alterations, and citations omitted).

"[T]hose legal principles have been distilled into consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). As to the chance of success on the merits, "more than a mere possibility of relief is required. By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor. . . . [T]he 'possibility' standard is too lenient." *Id.* at 434-35 (internal alterations, quotation marks, and citations omitted).

"[A] reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant[.]'" *Id.* at 426-27 (emphasis added) (internal citations omitted). A stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968). It is well established that it is the stay applicant's burden to demonstrate that the four factors for obtaining a stay pending appeal are satisfied. *E.g., Nken*, 556 U.S. at 433-34.

In the procedural posture of this case, we are considering whether the defendants are likely to be able to show that the district court abused its discretion in granting a preliminary injunction. *See U.S. Student Ass'n Found. v. Land,* 546 F.3d 373, 380 (6th Cir. 2008). "A district court's determination as to each of the elements required for a preliminary injunction are mixed questions of fact and law, the facts of which this Court leaves undisturbed unless clearly erroneous." *Bluefield Water Ass'n, Inc. v. City of Starkville,* 577 F.3d 250, 253 (5th Cir. 2009). Questions of law are reviewed *de novo,* but "the ultimate decision for or against issuing a preliminary injunction is reviewed under an abuse of discretion standard." *Id.* (quotation marks omitted).

Moreover, under this Court's precedent, the district court's denial of a stay pending appeal is reviewed for abuse of discretion: "[T]he accepted standard for review of such a stay is whether or not the trial court abused its sound discretion in denying the stay." *Beverly v. United States,* 468 F.2d 732, 740 n. 13 (5th Cir. 1972); *see also, e.g., Wildmon v. Berwick Universal Pictures,* 983 F.2d 21, 23 (5th Cir. 1992) (same); *Allen v. La. State Bd. of Dentistry,* 948 F.2d 946, 949 (5th Cir. 1991) (applying abuse of discretion standard to district court's stay ruling).

Whether or not the plaintiffs prevail in this court, the fact is that they were granted partial constitutional relief by the district court. The burden is on the Secretary to establish that the judgment of the district court should not be enforced. In my

judgment, as in the judgment of the district court, the Secretary has failed to carry her burden to make a strong showing that: (1) the state will be irreparably injured if a stay is not granted pending her appeal; (2) on the other hand, there is *not* a substantial likelihood that the First Amendment speech and voting rights of the plaintiff voter organizations and of the citizens they seek to assist will be irreparably injured by the stay; (3) there is a strong likelihood that the Secretary will succeed on the merits in her appeal; and (4) the public interest will be served by the stay.

II. No Irreparable Injury Shown By Applicant

The Secretary has not carried her burden of demonstrating that she will be irreparably injured absent a stay of the district court's judgment during her appeal. *See Nken*, 556 U.S. at 433-34; *Hilton*, 481 U.S. at 777. "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35 (citations omitted). The Secretary introduced no evidence to show that she or the state would be injured by the injunction of the enforcement of the five election code provisions during her appeal. The majority does not find from the record that the applicant will be irreparably injured, either; it merely presumes that a state is irreparably injured whenever any of its laws is enjoined, citing statements to this effect by two members of the Supreme Court in individual chambers opinions. *See* Maj. Op., *ante* at 19-20. Those statements have not

been embraced by the whole Court, however, and were made as part of a much different standard to be applied only during a Circuit Justice's individual determination of whether to issue a stay pending the Court's consideration of a petition for certiorari.[1] They were not intended as precedents to be followed by the courts of appeals in deciding whether to stay judgments of district courts. Instead, those members of the Court, both chief justices, joined the Court's majorities in prescribing the standards stated above that we must adhere to in deciding whether to stay a district court judgment pending appeal in *Nken v.*

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[1] Citing *Maryland v. King*, No. 12A48, 2012 WL 3064878, at *2 (Roberts, Circuit Justice 2012); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977)). In those cases, the standard the Court applied for obtaining a stay pending disposition of a petition for a writ of certiorari was entirely different that involved in an application for a stay pending appeal, imposing a much lower burden on the applicant. *See King*, 2012 WL 3064878 at *1. Moreover, as later cases have observed, this statement by itself is remarkably overbroad. "[A] state may suffer an abstract form of harm whenever one of its acts is enjoined. To the extent that is true, however, it is not dispositive of the balance of harms analysis. If it were, then the rule requiring 'balance' of 'competing claims of injury[ ]' would be eviscerated. Federal courts instead have the power to enjoin state actions, in part, because those actions sometimes offend federal law provisions, which, like state statutes, are themselves 'enactments of its people or their representatives.'" *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (internal citations and alterations, and emphasis omitted), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

Holder, 556 U.S 418 (2009) and *Hilton v. Braunskill,* 481 U.S. 770 (1987).

Here, the state has not demonstrated any concrete way in which it would be irreparably injured by the denial of a stay of the district court's judgment during its appeal. The five provisions at issue here are the in-state requirement, the in-county requirement, the personal delivery requirement, and the photocopying prohibition, and the compensation prohibition. The Secretary argues, without presenting evidence or proof, that the district court's injunction of the provisions will irreparably injure the state's efforts to prevent election fraud. Most importantly in the stay context, the state did not provide any evidence at all that it has experienced any specific type of fraudulent activity; it merely asserts that the enjoined laws protect against the threat of fraud.

Tellingly, the majority does not advert to, rely on, or treat as meritorious the Secretary's arguments that the state is likely to be irreparably injured because the injunction will hamper its efforts to deter and detect fraud. Thus, it is undisputed that the argument lacks persuasion. While a state may enact a law based on a hunch that it will curb fraudulent conduct, a showing that the nonenforcement of such a provision will produce irreparable injury must be based on evidentiary proof. The Supreme Court has admonished that "simply showing some 'possibility of irreparable injury[ ]' fails to satisfy th[is] factor." *Nken,* 556 U.S. at 434-35 (internal citation omitted). The Secretary has not attempted to point to any

evidence that the state will suffer irreparable injury because fraud is actually occurring, or that it is likely to occur because of the injunction of the five Election Code provisions. Without any substantiating evidence, the possibility of fraud is just that – a possibility.

The majority's mistake in finding that the Secretary carried her burden on this factor is evidently due to its inexplicable error in placing the burden of proof or persuasion on the plaintiffs rather than on the stay applicant, the Secretary. *See* Maj. Op., *ante* at 5 ("[W]e have here the somewhat circular situation of deciding whether there is irreparable harm to Andrade in part by analyzing the likelihood of success on the merits by Appellees of showing irreparable harm to them.") The majority's "circular" notion that the plaintiffs must show their likelihood of success and irreparable injury or else the Secretary is deemed to be irreparably harmed is dead wrong. The plaintiffs are not required to carry any burden in connection with the question of whether this court should stay the district court's judgment. As the Supreme Court has repeatedly held, the stay applicant, here the Secretary, bears the burden of proving all four of the factors required for a stay-irreparable injury to herself, the stay's lack of substantial injury to the plaintiffs, the Secretary's strong likelihood of success on the merits, and the stay's lack of injury to the public. There is no justification in law or warrant in the record for the majority to cast the burden on the plaintiffs and collapse its analysis into a unitary

inquiry of whether the plaintiffs have shown likelihood of success on the merits.

III. Substantial Injury to Appellees

The absence of irreparable injury to the State is made all the more dramatic in contrast to the substantial injury that will result to the plaintiffs. The stay applicant bears the burden of showing both factors: that its own irreparable injury is likely if a stay is not issued, and that the plaintiffs will not be substantially injured if the stay is granted. *See, e.g., Nken,* 556 U.S. at 433-34. The majority elides most of its analysis as to whether the stay of the district court's judgment will substantially injure the plaintiffs. The majority also implicitly places the burden of proving the "substantial injury" prong on the plaintiffs rather than the defendants. *See, e.g.,* Maj. Op., *ante* at 7 n.9, 14 n.16. In my view, it is clear that the plaintiffs' constitutional rights of expression and association are likely to be substantially endangered and damaged during the upcoming federal campaign and elections if the district court's judgment is stayed.

The Supreme Court has held that deprivation of First Amendment rights constitutes injury sufficient to establish irreparable injury. *Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion). In *Elrod,* the Court affirmed a preliminary injunction entered against state officers that barred enforcement of a "patronage" policy under which civil service employees were required to pledge loyalty to a particular

political party. *Id.* at 350-51. The Court held that the policy infringed on the employees' First Amendment rights. *Id.* at 373. It explained, "[i]nasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." *Id.* (quotation marks omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* It added that "[t]he timeliness of political speech is particularly important. The purpose of the First Amendment includes the need to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them[.]" *Id.* at 374 n.29 (internal quotation marks, alterations, and citations omitted). Therefore, the Court held that the plaintiffs were likely to suffer irreparable injury and were entitled to a preliminary injunction.

Applying *Elrod*, I conclude that the plaintiffs have demonstrated that if the district court judgment is stayed they are likely to suffer substantial injury to their significant First Amendment rights of political speech and association. In other words, as the district court found, the plaintiffs' voter-registration efforts

and voting campaigns will be hamstrung by a stay of the district court's judgment.

The plaintiffs are organizations "dedicated to helping citizens become registered to vote and to encouraging eligible voters to vote." *Voting for Am. v. Andrade*, No. G-12-44, ___ F. Supp. 2d ___, 2012 WL 3155566, at *2 (S.D. Tex. Aug. 2, 2012). Among other avenues, they rely on voter registration drives to convey their pro-voting message and to achieve their goals of greater registration. Their mode of operation is to partner with local nonprofit and civil groups to which they provide funding; they hire temporary employees to serve as canvassers. *Id.* at *2-3. Canvassers are often locally hired, but their trainers and managers, as well as some canvassers, are specially trained to conduct voter-registration drives and may come from out of state in order to engage in voter-registration efforts. The canvassers go to high-traffic locations to encourage people to register to vote and to assist them in doing so.

Crucially, the canvassers collect the applications for delivery and return them to their supervisors, who in turn perform "quality analysis and control checks by reviewing the applications for completeness and signs on fraud." *Id.* at *2. They then photocopy or scan all documents with confidential information redacted for tracking purposes and then mail them to the appropriate state office. *Id.* at *2-3. This provision is important because applicants who are added to the rolls are later contacted and encouraged to actually vote. For applicants who were not added to voter

rolls, the plaintiffs seek to determine if the voter was rejected for a legitimate reason and if not, the plaintiffs inform them and contact them to re-register if they are eligible. The plaintiffs also use the information to keep track of whether voters are being denied the right to vote for improper reasons, and if so, they may seek legal or political action in response. *Id.* at *3. The plaintiffs also make hiring and termination decisions, based in part on the performance of their employees and volunteers in successfully registering voters. *Id.* at *3, *28.

The five enjoined provisions all serve to hamstring the plaintiffs' voter-registration efforts. The in-state restriction targets the plaintiffs because many of their organizers are trained nationally and come from out of state to engage in voter registration activity. As the district court found, the organizations' efforts are materially hampered if they cannot bring people from out of state to train their canvassers and oversee the process by which the applications are collected, checked for accuracy and completeness, and returned to the appropriate state agency. Likewise, the county limitation imposes significant administrative burdens on the plaintiffs. Employees must be trained and appointed in multiple counties. In addition, canvassers usually work in high-foot traffic areas, often in metropolitan regions, where many potential voters will be from different counties. Thus, canvassers must contend with potential voters residing in different counties traveling through population

centers. Especially in light of the fact that Texas has 254 counties, this burden is quite severe.

The photocopying restriction is highly detrimental to the plaintiffs' business model and mode of operations because the plaintiffs photocopy or scan all documents (with confidential information redacted) so they can track the applications after mailing. *See id.* at *2-3. This permits the plaintiffs to follow up with applicants and encourage them to vote, to determine if a voter was rejected for a legitimate reason and, if not, to address the problem, and to determine whether legal or other action would be advisable. It also allows the organizations to screen applications for potential fraud. If the plaintiffs do not have copies of these records, they cannot efficiently perform these functions and this crucial part of their organizational efforts would be very difficult if not impossible.

The in-person provision requires that the plaintiffs return the completed applications in person within five days or else face criminal penalties. This would impose a significant administrative burden in terms of work hours and costs because it would require the canvassers' time and effort to hand the applications in personally rather than simply sending them by mail. Because the individual who collects an application must personally deliver it within a short time period, the provision would also hamper the plaintiffs' ability to monitor the canvassers' work by performing quality analysis and control checks by reviewing the applications for completeness and signs of fraud, which could potentially take more than five

days given the volume of applications. *See id.* at *2-3. The possibility of criminal sanctions would likely make this provision all the more burdensome.

The compensation provisions will either force the plaintiffs to rely on volunteer staff only, which would likely decimate their available staff, or else will prohibit the plaintiffs from disciplining paid canvassers for poor performance or low productivity. The compensation provision criminalizes the plaintiffs' "practice of requiring some bare minimum level of productivity," which is an additional injury with which the plaintiffs would be threatened. *Id.* at *29. Conversely, the inability to discharge "deadweight" employees might in turn make it more difficult to function effectively and secure donors. *Id.* at *31.

As Michael Slater, Executive Director of Project Vote and Voting for America, stated in his affidavit, the organizations are actually and materially hampered from engaging in their chosen form of advocacy in Texas. While "Project Vote would like to directly fund voter registration activity in Texas," it is unable to do so "because of restrictions placed on organizations conducting voter registration drives, and the risk of criminal liability for the organizations . . . [and] employees[.]" Slater Decl. ¶ 8, at 3.

The district court found that "[s]o long as the provisions remain in force, the likely violations of Organizational Plaintiffs' statutory and constitutional rights continue, and they remain unable to engage in their chosen form of political speech and associational

activity." *Id.* at *33. The plaintiffs are unable to operate and get out their message. Especially in light of the impending elections, the timeline of the appeal will likely last beyond the deadline to get people registered for the November elections, even with an expedited appeal schedule. Thus, the plaintiffs will not be able to get out their message in time for the elections, which is a significant and irreparable harm. Consequently, the district court clearly did not abuse its discretion in finding that the Secretary failed to carry her burden to show that a stay likely would not substantially injure the plaintiffs.

IV. Likelihood of Success on the Merits

In addition to the two "injury" factors, the Secretary must make a "strong showing" that she is likely to succeed on the merits. *See, e.g., Nken,* 556 U.S. at 434. "[M]ore than a mere possibility of relief is required." *Id.* (internal citations and quotation marks omitted). In my view, the Secretary has not made a strong showing of a likelihood of success against either the First Amendment or the preemption claims.

A. First Amendment

The majority commits two grave errors in assessing the likelihood of success of the Secretary's argument that none of the enjoined state-law provisions violates the First Amendment. First, the majority takes an unprecedentedly narrow view of what

conduct implicates the First Amendment. Second, the majority attempts to make the Secretary's showing of potential success on the merits appear stronger by claiming that the plaintiffs' burden on the merits is heavier because they are making facial challenges to the state-law provisions, an approach the Supreme Court has never required and in fact disavowed in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

1. Voter-registration activities implicate the First Amendment

The plaintiffs are engaged in the First Amendment activities of encouraging and assisting voters in registering to vote and in voting on election day. In their methodology, the plaintiffs complete several steps that are woven into one process. First, they furnish registration applications and persuade individuals to fill them out and consent to their being filed with the proper registrars. Second, they copy the completed applications and see that the originals are properly filed with the correct registrars. Third, they check with the registrars to make sure that the registration applications have been properly recorded. Finally, they recontact the newly registered voters and provide them with assistance and encouragement in traveling to the proper voting places to vote on election day and render assistance if it appears they have been wrongfully denied the right to register to vote. *See Voting for Am.*, 2012 WL 3155566, at *2-3.

The Secretary has not met her burden of proving a likelihood of success on the merits of her First Amendment argument. As the majority opinion observes, the Secretary concedes that the speech and expressive conduct in which the plaintiff organizations engage are within the protection of the First Amendment. *See* Maj. Op., *ante* at 10. The majority opinion's First Amendment analysis relies on a compartmentalization of the plaintiffs' activities, reasoning (1) that the voting regulations target only the physical collection and submission of completed voter applications, and (2) that those particular activities are not part of expressive political conduct. However, the collection and submission of completed voter application materials are inextricably intertwined with plaintiffs' political speech and expressive conduct in persuading and assisting voters to register, in making certain their registration applications are delivered and recorded by the proper registrars, and in encouraging and assisting the voters to actually vote on election day. Thus, all of the plaintiffs' speech and activities involved in this entire process constitute core political speech and are protected by the First Amendment.

The majority's interpretation and approach is inconsistent with the Supreme Court's First Amendment jurisprudence. Federal courts have rejected invitations like defendants' to compartmentalize core political activities from the "procedural" or "ministerial" aspects of those activities; the majority cannot point to a single federal decision that has approved

the separation of expressive conduct from core political speech as it does today. The Supreme Court rejected this divide-and-conquer strategy in cases in which the Court considered whether a similar core political activity, initiative petition circulation, was protected by the First Amendment. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Meyer v. Grant*, 486 U.S. 414 (1988). In fact, in both *Buckley* and *Meyer*, the state made the nearly identical argument that Texas does here – it argued that its regulations targeted only the ministerial tasks of collecting and submitting the signatures on a petition. The Court was asked to compartmentalize those activities and conclude that the regulations only applied to the collection and submission of completed initiative applications – but the Court rejected the state's invitation to do so and found that all of the circulators' activities involved in initiative petition circulation were protected.

In *Buckley*, the Supreme Court held that the circulation of initiative petitions and attendant speech and activity is protected by the First Amendment. 525 U.S. at 192. The Court struck down a Colorado statute regulating the petition process, holding that three provisions violated the First Amendment's free speech guarantee: a provision requiring that initiative-petition circulators be registered voters; a provision requiring that initiative-petition circulators wear identification badges bearing the circulator's name; and a provision requiring that proponents of an initiative must report names

and addresses of all paid circulators and amounts paid to each circulator. *Id.* at 186, 192.

In defending the regulations, the State of Colorado made a nearly identical argument in favor of its regulations on ballot-initiative circulation as the Secretary does in this case. Citing concerns about fraud in initiative circulation, Colorado argued that the conduct did not entail protected speech or expressive conduct: "The circulator *collects* the votes and *presents them to [the] Secretary of State to be validated and counted.* The signers depend upon the circulators to *collect and submit the signatures.*" Petition for Certiorari, *Buckley v. Am. Constitutional Law Found., Inc.* (No. 97-930), 1997 WL 33485681, at *11 (emphasis added). The state contended, "the circulator assumes a public role which can be regulated." *Id.* at *10. Thus, it argued that the conduct was not speech entitled to the highest protection of the First Amendment. *See id.*

The Court rejected this argument, concluding the conduct was important to voters to ensure that "the political process is responsive to their needs." *Buckley,* 525 U.S. at 196 (quotation marks omitted). The Court held that the underlying conduct was protected speech because it entailed "communication with voters about proposed political change[.]" *Id.* at 192. The communication at issue was "core political speech" for which First Amendment protection was "at its zenith." *Id.* at 186-87 (internal quotation marks omitted) (quoting *Meyer,* 486 U.S. at 422, 425). The Court found that the plaintiffs' speech was

severely burdened by the law and, applying strict scrutiny, that the significant restriction on speech was not narrowly tailored to serve the asserted state interests of "administrative efficiency, fraud detection, [and] informing voters." *Id.* at 192 & n.12. Thus, all of the speech and connected conduct was protected.

Similarly, in *Meyer v. Grant*, the Supreme Court struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. 486 U.S. at 416. There, too, the state argued that circulators' conduct is not protected by the First Amendment. Colorado argued in its brief: "[T]he petition circulator [is] the person with the public duty to determine the validity of the signatures of the persons who sign the petitions. . . . The position is obviously governmental in nature. *The verification of signatures does not constitute speech*, and the prohibition against payment of petition circulators constitutes nothing more than the prohibition against payment for the *act of verifying signatures*. The fact that a person voluntarily links his conduct with a speech component does not transform the conduct into speech." Petitioner's Opening Brief, *Meyer v. Grant* (No. 87-920), 1987 WL 880992 at *12 (emphasis added).

The Court rejected Colorado's argument, holding that the activity of collecting and verifying signatures is connected with the ballot circulators' overall message. *See Meyer*, 486 U.S. at 421 ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a

discussion of the merits of the proposed change."). The Court explained, "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424. Thus, the Court held that the restriction on paying the circulators "restrict[ed] political expression" by, inter alia, "limit[ing] the number of voices who will convey appellees' message [.]" *Id.* at 422. The Court held that petition circulation is "core political speech" because it involves "interactive communication concerning political change." *Id.* at 424 (internal quotation marks omitted). First Amendment protection for such interaction is "at its zenith." *Id.* at 425 (internal quotation marks omitted). The Court held that Colorado's "refusal to permit appellees to pay petition circulators restricts political expression" because the "inevitable effect" of the state law was to "reduc[e] the total quantum of speech on a public issue." *Id.* at 422-23.

The *Meyer* Court concluded that, without question, the subject-matter of the initiative petition (whether the trucking industry should be deregulated in Colorado) was a matter of societal concern that the plaintiffs had a right to discuss publicly without risking criminal sanctions. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of

political and social changes desired by the people. Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Id.* at 421 (internal citations and quotation marks omitted).

Further, the Court in *Meyer* observed that "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22 (footnote omitted).

The Court explained that this "core political speech" was inextricably mixed up in the more procedural aspects of ballot circulation, but that the speech, like the solicitation of charitable contributions, was nevertheless within the protection of the First Amendment. *Id.* at 422 n.5 (citing *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). The Court stated: "Soliciting financial support

is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that *solicitation is characteristically intertwined with informative and perhaps persuasive speech* seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* (emphasis added) (internal quotation marks omitted).

Similarly, here, whether certain communities, such as Latino and African-American communities, are underrepresented in voting in Texas is a matter of societal concern that plaintiffs have a right to discuss publicly without risking criminal sanctions. More broadly, the decision of whether to vote and participate in the democratic process is a matter of public concern. Plaintiffs seek by voter registration drives and get-out-the-vote campaigns to achieve political change in Texas; their right freely to engage in discussion concerning the need for that change is guarded by the First Amendment. Project Vote organizers "approach members of the community, ensure that applications are completed legibly and completely, and discuss the importance of voting. [They] encourage canvassers to point out that if the community wants politicians to listen to their concerns and do something about them, then the community as a whole needs to get registered to vote." Slater Decl. ¶ 16, at 5. Canvassers "distribute and collect voter

registration applications while simultaneously discussing the importance of participating in the democratic process by voting." *Id.* ¶ 18, at 5. The ability to directly contact potential voters and assist them in filling out and submitting completed voter applications in person is a key way in which the organizations fulfill their mission of maximizing voter registration and "it also ensures that [potential voters] hear [their] message about how important it is to vote." *Id.* ¶24, at 8.

Like the circulation of initiative petitions, the canvassing of citizens to register to vote and to vote in elections "of necessity involves both the expression of a desire for political change" (including, e.g., the more adequate representation of historically disenfranchised voters in elections) and "a discussion of the merits of the proposed change" (e.g., the election of officials more empathetic to the needs of those voters). *Meyer,* 486 U.S. at 421. This will involve an explanation of why it is important that a person as a member of a class of voters become registered to vote and actually vote on election day. Thus, providing registration applications to these classes of voters, assisting them in actually recording their registrations, and assisting them and encouraging them to vote on election day is core political speech.

Moreover, just as the Court recognized in *Meyer* that the solicitation of signatures often involves speech protected by the First Amendment, so should we recognize here that the state's attempt to regulate the canvassing of persons to register to vote and to

actually vote on election day would infringe on that speech. The plaintiffs encourage and assist voters, especially those in historically disenfranchised groups, in registering to vote and in voting on election day. Their process involves several steps, all of which are "intertwined." First, they furnish registration applications and persuade individuals to fill them out and consent to their being filed with the proper registrars. Second, they copy the completed applications and see that the originals are properly filed with the correct registrars. Third, they check with the registrars to make sure that the registration applications have been properly recorded. Finally, they recontact the newly registered voters and provide them with assistance and encouragement in traveling to the proper voting places to vote on election day and render assistance if it appears they have been wrongfully denied the right to register to vote. *See Voting for Am.*, 2012 WL 3155566, at *2-3. The plaintiffs' registration and canvassing activities are "characteristically intertwined with informative and perhaps persuasive speech." *Meyer*, 486 U.S. at 422 n.5 (quotation marks omitted).

In both *Buckley* and *Meyer*, the Court refused to conclude that the ministerial act of collecting and submitting signatures for a ballot was the only conduct truly targeted by the regulations. The Court instead concluded that those activities were inherently wrapped up with the speech and expressive conduct that those signature drives entailed. Other courts have likewise rejected the Secretary's argument

in favor of compartmentalizing registration procedures from protected speech and conduct. *See, e.g., Bernbeck v. Moore*, 126 F.3d 1114, 1115 (8th Cir. 1997) ("We reject the Secretary of State's attempt to distinguish *Meyer* with the argument that the registered-voter requirement does not regulate 'political speech,' but rather the 'process' of conducting an initiative election, thereby raising no First Amendment concerns.").[2] Here, Texas is making the same argument – that the collection and submission of completed and signed voter registration applications to the county registrars is not protected conduct because it is a public function that should be divorced from the expressive elements of plaintiffs' activities. The same stratagem should be rejected here. Providing,

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[2] In addition, at least one federal district court has rejected a similar argument in the context of a voter-registration regulation much like the one at issue here. In *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1320-21 (S.D. Fla. 2006), the court found the collection and submission of completed voter applications to be highly important to the organization and relevant to the court's First Amendment analysis: "The ability to collect voter registration applications enables [the plaintiffs] to have follow-up communications with registrants about issues of common concern. . . . [O]nce [the organization] updates its database, it sends newly registered voters education materials, including materials about candidates and issues. Furthermore, [the plaintiffs'] application efforts facilitate[ ] their follow-up with the supervisors of elections to resolve any problems with incomplete applications or missing information and to ensure that their members are properly added to the voter rolls." *Id.* at 1320-21. The court held that the speech and conduct was squarely within the protection of the First Amendment. *Id.* at 1332-33.

collecting and delivering voter registration applications are all inherently bound up in the core political process of registration drives and get-out-the-vote campaigns.

The majority finds *Meyer* distinguishable because it addressed the constitutionality of a ballot initiative circulation law, not a voter-registration law. *See* Maj. Op., *ante* at 11 & n.11. Other than citing its "perception" that voter registration is different, Maj. Op., *ante* at 11, the majority does not justify distinguishing between these types of activities and core political speech although all other courts have rejected defendants' invitation to do so.

In light of the literally unprecedented nature of the majority's approach, I cannot see how the defendants have established a "strong showing" of likelihood of success on the merits, which the Supreme Court has emphasized means "more than a mere possibility of relief[.]" *Nken*, 556 U.S. at 434 (internal alterations and quotation marks omitted). Faced with a First Amendment argument with such a losing track record, it defies logic how the majority can find the argument to amount to anything more than "a mere possibility" that the defendants will prevail.

2. *The "facial challenge" concept does not create a "high hurdle" or change the burdens and standards governing the issuance of a stay pending appeal*

Contrary to the majority's reasoning, the plaintiffs' challenges may be more correctly described as a mixture of facial and as-applied challenges to the Secretary's enforcement of state laws that thwart and burden the plaintiffs' exercise of First Amendment political speech and associational rights in voter registration drives and get-out-the-vote campaigns. The majority's conclusion that the plaintiffs cannot be making both a facial challenge and an as-applied challenge rests on a faulty premise. The concept of a facial challenge is not well settled and there is not one single test for all facial challenges; on the contrary, the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010) has contradicted this erroneous idea. Rather, courts apply whatever constitutional doctrine is relevant to the claim in a particular case. *Id.* at 919 (Roberts, C.J., concurring) ("[T]he debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point. . . . Citizens United has a constitutional claim . . . [and][t]he Government has a defense. . . . Whether the claim or the defense prevails is the question before us."). "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* at 893 (majority

opinion) (citing, inter alia, Richard H. Fallon, Jr., *As-Applied Challenges and Third-Party Standing,* 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.")). The real significance of the facial/as-applied distinction, the Supreme Court has explained, is that "it goes to the breadth of the remedy employed by the Court[.]" *Id.* In other words, the facial invalidation of a statute is a broader remedy than an as-applied invalidation. The remedy in a successful facial challenge is an order barring enforcement of the law in all circumstances, whereas in an as-applied challenge, the remedy is an order barring enforcement in some particular set of circumstances. *See id.*

Likewise, the "no set of circumstances test" that the majority appears to employ to the plaintiffs' facial challenge lacks foundation. *See, e.g., Doe v. City of Albuquerque,* 667 F.3d 1111, 1126 (10th Cir. 2012) (quoting with approval the opinion "that the 'no set of circumstances' language from [*United States v. Salerno,* 481 U.S. 739, 745 (1987)] constituted 'nothing more than a controversial dictum' and . . . that 'diligent research' had failed to turn up 'a single Supreme Court case – including *Salerno* itself – in which the holding actually relied on the 'no set of circumstances' test'") (quoting *Sonnier v. Crain,* 613 F.3d 436, 463-64 (Dennis, J., concurring in part and dissenting in part); *see also* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules*

Versus Invalidating Statutes in Toto, 98 Va. L. Rev. 301, 312-14 & nn. 45-59 (2012) (collecting cases).

All this is to say, without exhaustively reiterating the facial versus as-applied debate, that the majority cannot invoke as a talisman the "facial challenge" concept to impose a higher burden that the First Amendment requires for proof of the plaintiffs' constitutional claims. The majority cannot, by this sleight of hand, shift the burden of persuasion off of the state and back onto the Plaintiffs, contrary to the burden and standards governing the issuance of stays prescribed by the Supreme Court's holdings in *Nken* and others. *See, e.g., Nken*, 556 U.S. at 433-34. The majority's approach lacks foundation in law and is contrary to the standards governing stays pending appeal that place the burden on the party requesting the stay to establish a likelihood of success.

3. *The Secretary did not make a strong showing that she is likely to succeed in defending the burdens imposed on First Amendment rights by the state voter registration provisions enjoined by the district court.*

Applying the correct First Amendment principles, the district court justifiably concluded that the Secretary failed to carry her burden to make a strong showing that she is likely to succeed on the merits in her appeal. For the reasons stated by the district court, and for additional reasons assigned herein, I

agree that the Secretary's motion to stay the district court's judgment should be denied.

The burdens imposed on the plaintiffs' core political conduct and speech make it impossible for them to conduct voter registration drives and get-out-the-vote campaigns using their chosen effective methods of operations they have employed in other states. The state argues that the restrictions imposed by its laws are necessary to prevent fraud in connection with elections in Texas. The only specific kind of fraud it identifies, however, are cases in which a voter registration worker intentionally deprives a person of the opportunity to vote by failing to deliver timely a completed registration application to the appropriate registrar, or in which a person fraudulently uses a false identity to register and to vote in an election. The district court reasonably concluded that the election regulations at issue burdened the plaintiff organizations' core political conduct and speech without narrowly tailoring its restrictions to further its goal of preventing or punishing these specific kinds of criminal conduct.

With regard to the in-state restriction (Tex. Elec. Code §§ 13.031(d)(3) & 11.002(a)(5)), the district court found it was likely to violate the First Amendment because it "imposes a substantial burden on [plaintiffs'] First Amendment rights, and Defendants have not been able to explain how it substantially advances a legitimate state interest." *Voting for Am.*, 2012 WL 3155566, at *25. It imposes a substantial burden on the plaintiffs' rights because they are prevented

from making use of their nationally trained staff and from engaging in their chosen mode of operation they deem the most effective. On the other hand, the state did not explain how the law advances the state's goal because the state did not produce any evidence that non-residents of Texas were any more apt to commit these wrongs than Texas residents. *Id.* at *24-25. Indeed, the state introduced no evidence that these misdeeds had been committed in Texas by either residents or non-residents. *Id.* at *25, *34.

As to the county limitation (Tex. Elec. Code § 13.038), the court found it was likely to violate the First Amendment because it imposes a heavy administrative burden on an organization conducting voter registration drives as its employees must be recruited, appointed, and trained in each county (and Texas has 254 counties), which would not be feasible or efficient in urban centers covering multiple counties. *Id.* at *25-26 & n.21. Conversely, there are little or no "county-specific issues" that arise vis-à-vis voter registration, as it is a state or federal matter, and county-level registration would have a negligible impact on voter fraud. *Voting for Am.*, 2012 WL 3155566, at *26-27. Thus, the law imposes a heavy administrative burden but is not narrowly tailored to achieving the state's goal of fraud prevention.

Finally, the court held that two of the three sub-provisions of the compensation prohibition (Tex. Elec. Code §§ 13.008(a)(1) & (3)) violated the First

Amendment.[3] The court reasoned that subsections (1) and (3) severely burden the plaintiffs' First Amendment activities because they prohibit the plaintiffs from disciplining canvassers for poor performance or low productivity and criminalizes the plaintiffs' "practice of requiring some bare minimum level of productivity," and the statute could not and did not draw the line between bare minima and theoretical "excessively high quotas." *Voting for Am.*, 2012 WL 3155566 at *29. In addition, it would make it nearly impossible to discharge "deadweight" employees, which might accumulate in the organization as time progresses, which in turn would make it more difficult to function effectively, secure donors, etc. *Id.* at *30-31.[4]

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[3] The plaintiffs did not challenge subsection (2), prohibiting the payment of canvassers per application collected, because they do not employ that practice.

[4] The majority's opinion does not engage with the district court's finding on this point, but rather calls the threat "hypothetical," citing the fact that the plaintiffs are making a facial challenge. Maj. Op., *ante* at 16. But this does not change the fact that the text of the compensation provision prohibits common and necessary employment practices. the Secretary challenged the district court's finding as to this point, arguing that the district court erred in interpreting section 13.008, the compensation provision, as forbidding organizations to fire employees for "lack of diligence." She argues that the court should have interpreted the provision to imply that only compensation for "excessively high quotas" would be criminalized under the statute. Contrary to the majority's suggestion, it is the Secretary's, not the plaintiffs', interpretation that is "hypothetical" because the Secretary cannot point to a firm reason why this limitation must be read into the statute. The "excessively high quota" limitation does not appear in the plain text of the statute,

(Continued on following page)

The court postponed the decision of whether strict scrutiny would apply to this provision, and held that it did not even pass muster under the less restrictive *Anderson-Burdick* balancing test. *Id.* at *32. Though the state advanced a legitimate state interest (preventing voter fraud), the law is not narrowly tailored as it would criminalize common necessary employment practices. *Id.*

The majority concludes that the state's interests in deterring and preventing fraud are sufficient to sustain the election regulations. However, the Secretary has not introduced evidence of fraud; the majority takes it at face value that an unsubstantiated risk of fraud is enough to justify a significant infringement on the plaintiffs' First Amendment rights. As Justice Thomas noted in his concurring opinion in *Buckley*, however, "the State has failed to satisfy its burden demonstrating that fraud is a real, rather than a conjectural, problem." 525 U.S. at 210 (Thomas, J., concurring).

The majority's reasoning is doubly unpersuasive because, with regard to the regulations the district court found likely unconstitutional, the court not only noted that the Secretary failed to demonstrate any evidence of actual fraud, but also that the Secretary

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and the Secretary does not proffer any principle of statutory interpretation that would permit the court to conclude that the statute only applies to "excessively high quotas." *Cf.* Tex. Elec. Code § 13.008. Thus, the Secretary has not made a strong showing that she is likely to prevail on this argument.

failed to demonstrate how the provisions would reasonably achieve the goal of fraud prevention. Thus, although a state need not have evidence of fraud to justify enactment of a particular election regulation, without objective evidence or expert opinion, the Secretary failed to make a strong showing that the measure actually prevented or reduced fraudulent acts and was narrowly tailored to do so.

Moreover, other laws preexisting the third-party registration law were in place to prevent fraud, *see, e.g.*, Tex. Elec. Code § 13.007 (stating that a person commits an offense if he or she "knowingly makes a false statement or requests, commands, or attempts to induce another person to make a false statement on a registration application"); as the district court reasoned, enjoining the provisions in question were not demonstrated to materially lessen the deterrent effect of the whole scheme of applicable Texas laws.

For these reasons, the Secretary did not meet her burden of making a strong showing that she is likely to prevail on the merits. The district court did not abuse its discretion in denying the Secretary's motion for a stay pending appeal as to the provisions enjoined pursuant to the First Amendment.

B. Preemption

The Secretary also has not met her burden of making a strong showing of her likelihood to succeed on the merits in proving that two of the Texas election provisions, the photocopying ban and the in-person

delivery of applications requirement, have not been preempted by the National Voter Registration Act (NVRA).

1. Preemption under the Elections Clause

The right to vote has long been recognized as central to the protection and exercise of the other rights guaranteed in our society. As noted by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." Nevertheless, many practical barriers remain that inhibit the free exercise of this recognized right. Among such barriers are restrictive or prohibitively inconvenient voter registration requirements that discourage or even prevent qualified voters from registering and participating in elections. "In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the National Voter Registration Act in 1993." *Ass'n of Comm'y Orgs. for Reform Now v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) (citing 42 U.S.C. §§ 1973gg(a),(b)).

The NVRA reflects the view of Congress that the right to vote "is a fundamental right," that government has a duty to "promote the exercise of that right," and that discriminatory and unfair registration laws can have a "damaging effect on voter participation" and "disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C.

§ 1973gg(a). Congress enacted the NVRA in order to "increase the number of eligible citizens who register to vote" in federal elections, "enhance[] the participation of eligible citizens as voters[,]" "protect the integrity of the electoral process[,]" and "ensure that accurate and current voter registration rolls are maintained." *Id.* § 1973gg(b); *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 334 (4th Cir. 2012).

The NVRA directs states to establish at least three methods of voter registration for federal elections: "(1) by application made simultaneously with an application for a motor vehicle driver's license[,]" "(2) by mail application" using a federally prescribed form, and "(3) by application in person" at designated voter registration agencies. 42 U.S.C. § 1973gg-2(a). It further requires that states conduct a general program to remove ineligible voters from official voter lists without engaging in improper voter removal. *Id.* § 1973gg-6(a)(3)-(4); *Long*, 682 F.3d at 334.

Section 8(i)(1) of the NVRA mandates public disclosure of voter registration activities. *Id.* § 1973gg-6(i)(1). It generally requires states to "make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" *Id.* "This language embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be

sacrificed to administrative chicanery, oversights, or inefficiencies." *Long*, 682 F.3d at 334-35.

Of the eight regulations at issue in the present case, the district court entered an order preliminarily enjoining the enforcement of Texas' photocopying prohibition (Tex. Elec. Code § 13.038, as interpreted by the Secretary) and personal delivery requirement (*id.* § 13.042), finding them to be preempted by the NVRA. When preemption challenges are brought against state election laws, the Elections Clause of the Constitution governs. *See Foster v. Love*, 522 U.S. 67, 69 (1997).

"The Elections Clause establishes a unique relationship between the state and federal governments." *Gonzales v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) (en banc). The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. art. I, § 4, cl. 1 (spelling modernized). Thus, while states have the initial responsibility of establishing election laws and regulations, Congress has the authority to "make or alter" the states' regulations. The text of the constitutional provision expressly delegates to Congress ultimate supervisory authority over elections laws.

When states enact election laws that are contrary to federal election laws, the state laws are unquestionably preempted. *See Ex Parte Siebold*, 100 U.S.

371, 384 (1879) (when Congress' power under the Elections Clause is "exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them"); *Foster*, 522 U.S. at 69 (stating that the Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices") (internal citation omitted). However, unlike preemption for ordinary laws under the Supremacy Clause, there is no presumption against preemption for state election laws that are contrary to federal election mandates. As the court in *Gonzales* explained, "[i]n contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." 677 F.3d at 392. "[T]he Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause." *Id.* at 400 (Kozinski, C.J., concurring).

Under our Circuit precedent, if a state election law "directly conflicts" or is "inconsistent with" a federal election law, the state law is preempted under the Elections Clause. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775, 776 (5th Cir. 2000). Applying this rule, the district court held that the two regulations at issue "directly conflicted" with the NVRA and were therefore preempted under the Elections Clause.

The district court did not find it necessary to go any further than its "direct conflict" analysis. However, this court's language in *Bomer* finding preemption where a state election law "directly conflicts" or is "inconsistent with" a federal election law has deeper roots in Supreme Court precedent indicating that preemption under the Election Clause entails a more searching analysis than preemption under the Supremacy Clause. *See id.* (citing *Foster*, 522 U.S. at 68). *Bomer* reflects that there is no presumption against preemption when it comes to state laws that "conflict" or are "inconsistent with" federal election regulations enacted by Congress, consistent with the Supreme Court's opinion in *Foster v. Love*. *See* 522 U.S. at 69 (stating that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices") (internal citation omitted).

As the Ninth Circuit persuasively elucidated in *Gonzales v. Arizona*, "[w]hile Congress may not always choose to exercise [its Election Clause] power, 'when exercised, the action of Congress, so far as it extends and conflicts with the regulations of a State, necessarily supersedes them.'" 677 F.3d at 391 (alteration omitted) (quoting *Ex Parte Siebold*, 100 U.S. at 384, and citing *Foster*, 522 U.S. at 69). The Ninth Circuit in *Gonzales* concluded that under *Siebold* and *Foster*, courts should approach preemption under the Elections Clause by reading state and federal election

laws together as one single system of election law. It explained:

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold*, 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster*, 522 U.S. at 74, 118 S.Ct. 464; *see id.* at 72-73, 118 S.Ct. 464. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

Gonzales, 677 F.3d at 394.

Applying the principles of *Foster* and *Siebold*, as explained in *Gonzales* and *Bomer*, I conclude that the Secretary has not met her burden of showing a strong likelihood of success that the Texas photocopying ban and personal delivery requirement are not preempted

by the NVRA either under the Fifth Circuit's "direct conflict" or "inconsistent with" test or under the Ninth Circuit's failure to "operate harmoniously" test.

2. The photocopying provision

As interpreted by the Secretary, section 13.038 flatly prohibits any person collecting voter registration applications from photocopying them before they are delivered to the registrars. The Secretary does not change her interpretation on appeal. Relying on the Secretary's interpretation of how section 13.038 is to be enforced, the district court held that the photocopying provision (Tex. Elec. Code § 13.038) directly conflicts with the NVRA provision, 42 U.S.C. § 1973gg-6(i)(1). Subsection 6(i)(1) provides:

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

In *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012), the court considered the State of Virginia's practice of prohibiting public disclosure of applications that had been accepted but

rejected by registrars. Voting rights groups wanted to see the ones that had been rejected to ensure transparency in the voter registration process, and to investigate whether a group of students at a historically African-American university had been unlawfully disenfranchised. *Id.* at 333-34. The court held that all completed applications must be made available for copying under the NVRA. *Id.* at 336. The Fourth Circuit held that in this provision, because "the phrase 'all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters' unmistakably encompasses completed voter registration applications, such applications fall within Section [6](i)(1)'s general disclosure mandate." *Id.* The court reasoned that reviewing voter registration applications is a "program" and "activity" because it is carried out to maintain voter rolls for the state, and the registration applications are "records" that concern the "implementation of" that "program[ ] and activit[y]" because they are the means by which voters establish their eligibility to vote. *Id.* at 335-36. The court noted that the state was entitled to redact sensitive information, such as social security numbers, when it complied with the NVRA provision, thus obviating the state's principal concern. *Id.* at 334, 339. The court concluded that Virginia's provision was preempted by the NVRA. *Id.* at 337.

In addition to its textual analysis, the court emphasized that the NVRA expresses a policy strongly favoring transparency and public disclosure of

completed voter applications. *See id.* at 334. The NVRA photocopying provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Id.* at 334-35.

Following *Long*, the district court in the present case found that the NVRA's rule requiring states to "make available" the records for photocopying "unmistakably encompasses completed voter registration applications." *Voting for Am.*, 2012 WL 3155566, at *16-17. The sound reasoning in *Long* is substantially applicable to this case. As Judge Wilkinson noted in *Long*, the NVRA is intended to guard against franchise sacrifice to state "administrative chicanery, oversights, or inefficiencies" in the conduct of federal elections. *See* 682 F.3d at 335. The NVRA embodies a strong policy in favor of transparency in election regulations, which extends to the disclosure of completed voter applications. Here, the Texas provision punishing a person for retaining a photocopy of a completed application before filing is just as detrimental, if not more so, to the NVRA's mandate of public disclosure of voter registration activities. Texas' photocopying ban prevents VDRs from providing their own check (by retained photocopies) against franchise sacrifice to "administrative chicanery, oversights, or inefficiencies" that the NVRA was enacted to guard against. Texas' photocopying restriction applies to completed applications whether or not VDRs redact sensitive information; thus, it provides

for punishment even if a VDR redacts voters' sensitive information from the copy. Therefore, the photocopying restriction is not narrowly designed to protect voters' privacy, which could be safeguarded by laws specifically punishing use or abuse of such sensitive information. Consequently, in my view the district court did not err or abuse its discretion in deciding that there is a substantial likelihood that the Texas photocopying ban has been preempted because it is inconsistent and disharmonious with the NRVA public disclosure provisions.

3. The in-person provision

Next, the district court in the present case held that the personal delivery requirement directly conflicted with NVRA provisions 42 U.S.C. §§ 1973gg-4(a)(1)-(2) and 1973gg-6(a)(1). Subsection 4 provides that "[e]ach State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973-7(a)(2)[.]" *Id.* § 1973gg-4(1). Subsection 2 states that "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in Elections for Federal office . . . by mail application pursuant to section 1973gg-4[.]" *Id.* § 1973gg-2(a). Subsection 6 likewise requires each state to "ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section

1973gg-4" if the form is postmarked in time. *Id.* § 1973gg-6(a)(1).

The district court interpreted these provisions to mean that the federal mail-in application "must be allowed in all circumstances." *Voting for Am.*, 2012 WL 3155566 at *18 (citing *Charles H. Wesley Educ. Found v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005).) In *Charles H. Wesley*, the Eleventh Circuit held that Georgia's voter-registration law prohibiting the mailing of "bundled" voter applications was preempted by the NVRA. It explained: "By requiring the states to accept mail-in forms, the Act . . . regulate[s] the method of delivery, and by so doing overrides state law inconsistent with its mandates. The Act simply requires that valid registration forms delivered by mail and postmarked in time [to] be processed." 408 F.3d at 1354.

In the present case, the district court found that federal law makes no distinction between VDRs and voters mailing in applications on their own behalf, and that Texas' in-person requirement is inconsistent with the federal law, which requires that states "accept and use" all federal mail-in applications. *Voting for Am.*, 2012 WL 3155566, at *18-19 (citing *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702 n.6 (N.D. Ohio 2006) (finding a state law "requir[ing] personal delivery of voter registration forms . . . would clearly run afoul of the NVRA").) Therefore, the district court held the personal delivery requirement likely to be preempted.

Texas states that it will accept all mailed in applications, regardless of whether the sender violates state law in mailing them in rather than submitting them in person. However, even if this is the case, it remains that Texas prohibits third parties from submitting applications by mail under pain of criminal punishment, even though mail-in applications must be permitted under federal law. The public is entitled under federal law to take advantage of mail-in voter applications. The Texas law punishes third parties criminally for submitting voter applications by mail when there is a federal directive to the contrary. *See* Tex. Elec. Code § 13.043. The NVRA makes no distinction or exception for third parties, such as VDRs, mailing in applications. There is a direct conflict and certainly a "disharmony" or "inconsistency," causing the law to be preempted by the NVRA. The Secretary bears a heavy burden of demonstrating that she is likely to succeed on the merits of her challenge, and she has not met her burden here.

V. Public Interest

Finally, a stay of the district court's judgment will not serve the public interest. *See, e.g.*, *Hilton*, 481 U.S. at 777. A stay pending appeal is contrary to the public interest because, as the Supreme Court has stated, "voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takashi*, 504 U.S. 428, 433 (1992) (quotation marks omitted). The laws here "reduc[e] the total quantum

of speech on [the] public issue[s]" of voter registration and minority enfranchisement, *see Meyer*, 486 U.S. at 423, and are likely to diminish the total number of eligible voters who are registered in Texas, especially among historically underrepresented communities.

Texas' voter registration laws unquestionably made it more difficult to register to vote, thereby decreasing the level of enfranchisement in the state. The plaintiffs' voter-registration drives "are primarily aimed at registering voters from demographic groups . . . with a history of underrepresentation in the political process." *Voting for Am.*, 2012 WL 3155566, at *2. As the district court found, it is in the public interest to protect constitutional rights and effectuate the enforcement of the federal statute, and, most importantly, to ensure that all voters have access to the polls on election day. *See id.* at *35. As discussed above, it is not clear how the enjoined provisions will actually help fight voter fraud; and on the other hand, the provisions are alleged to contribute to disenfranchisement of vulnerable and historically disenfranchised voters, such as the young, the elderly, the disabled, and racial minority communities in Texas.

The state's asserted interest in preventing voter fraud cannot justify the severe impingement on plaintiffs' voter-registration rights and the concomitant intrusion into the ability of many historically disenfranchised voters to register to vote. In this election cycle, two Voting Rights Act panels have refused to preclear portions of Texas' recently overhauled election law regime, finding that the

redistricting and the voter ID provision are both likely to have the effect of reducing the number of minority voters eligible to vote in the state. *See Texas v. Holder*, No. 12-0128, ___ F. Supp. 2d ___, 2012 WL 3743676 (D.D.C. Aug. 30, 2012); *Texas v. United States*, No. 11-1303, ___ F. Supp. 2d ___, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) (redistricting). As Judge Tatel persuasively demonstrated in his opinion for the three-judge panel, the voter ID law at issue was akin to other historical barriers to enfranchisement such as poll taxes, literacy tests, grandfather clauses, and property qualifications. Those barriers, "though race-neutral on their face," were calculated to reduce the number of racial minorities to vote. *Texas v. Holder*, 2012 WL 3743676, slip op. at *8. The majority's opinion today, I fear, lends legitimacy to a modern iteration of these historical ballot access measures – draconian voter-registration regulations. The Secretary has failed to carry her burden to make a strong showing that there is a likelihood that she will prevail on the merits; that the state will be irreparably injured by the lack of a stay; that the plaintiffs will not be substantially injured by the stay; and that the public interest will not be harmed by the stay. The majority disregards the Supreme Court's declaration of the burden of proof and standards governing the issuance of a stay of a district court's judgment and it clearly errs in granting the stay. Accordingly, I dissent.

SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 12-71

FILED
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In The

Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Petitioners,

v.

JESUS M. GONZALEZ, BERNIE ABEYTIA; DEBBIE LOPEZ; GEORGIA MORRISON FLORES; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; FRIENDLY HOUSE; CHICANOS POR LA CAUSA, INC.; ARIZONA HISPANIC COMMUNITY FORUM; COMMON CAUSE; PROJECT VOTE, AND THE INTER-TRIBAL COUNCIL OF ARIZONA, ARIZONA ADVOCACY NETWORK, STEVE M. GALLARDO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, LEAGUE OF WOMEN VOTERS OF ARIZONA, AND HOPI TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GONZALEZ RESPONDENTS' BRIEF IN RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The recent decision of a Fifth Circuit motions panel in *Voting For America, Inc. v. Andrade*, No. 12-40914, 2012 WL 4373779 (5th Cir. Sept. 26, 2012) (unpublished) [hereinafter "*Andrade* Slip. Op."] neither creates a split in the Courts of Appeals with respect to Elections Clause preemption analysis nor supports Arizona's Petition for Certiorari in this case. On the contrary, the motions panel in *Andrade* applied this Court's well-established test for Elections Clause preemption to conclude, on a preliminary basis, that the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg et seq., did not conflict preempt two new Texas laws regulating the handling of completed voter registration applications by volunteer deputy registrars.

The majority in *Andrade* did not address the questions whether there is a presumption against preemption in Elections Clause cases, or whether there was field preemption in that case, because those issues were not before the panel. The motions panel, noting that its decision was based on abbreviated briefing and "disclaim[ing] any intent to bind a subsequent merits panel,"[1] merely concluded that the

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[1] *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997) *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) ("Of course, a panel hearing the merits of an appeal may review a motions panel ruling, and overturn it where necessary."); *Johnson v. Burken*, 930 F. 2d 1202, 1205 (7th Cir.

(Continued on following page)

district court's injunction should be stayed because, under the traditional analysis, the challenged Texas laws were likely not conflict preempted.

The conflict preemption analysis of the Fifth Circuit motions panel was entirely consistent with the Ninth Circuit's conflict preemption analysis in this case. Arizona's claim that the Fifth and Ninth Circuits now employ "vastly different tests" is a red herring and cannot find support in either decision.

ARGUMENT

I. The Fifth Circuit's Approach to Election Clause Preemption Is Consistent with the Ninth Circuit's Approach in This Case.

In *Andrade*, the Fifth Circuit motions panel considered whether to stay, on an emergency basis, the order of a district court enjoining two recently-enacted Texas laws regulating how volunteer deputy

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1991) ("Decisions by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission."); *Law v. NCAA*, 134 F.3d 1025, 1028 n. 3 (10th Cir. 1998) ("A decision of a motions panel . . . is not binding on the merits panel."); *Lambert v. Blackwell*, 134 F.3d 506, 512 n. 17 (3d Cir. 1997) (conclusion of motions panel, "based on a record less complete than that before us and not reached after the opportunity for the intensive study available to a merits panel, is not binding on this panel"); *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (declining to apply law of the case doctrine to decision of motions panel).

registrars (deputized by the counties) handle completed voter registration applications.[2] The NVRA preemption challenge related to whether volunteer deputy registrars could be prohibited from photocopying completed voter registration forms before submitting them to the county registrar offices and whether volunteer deputy registrars could be required to hand deliver the applications to the country registrars. *Andrade* dealt only with the handling of voter registration forms by volunteers and did not address the issue in this case – whether a state can condition its acceptance of the federal mail voter registration form on the voter applicant's satisfaction of additional, state-created documentation requirements.

The *Andrade* district court found that the new Texas laws "directly conflict" with the NVRA. Op. and Order Granting in Part and Denying in Part Pls.' Mot. for Prelim. Inj., *Voting For America, Inc. v. Andrade*, No. G-12-44 at 41 (S.D. Tex. Aug. 2, 2012), ECF No. 65. In deciding whether to grant a stay of the district court's order, the Fifth Circuit motions panel examined the same conflict preemption question.

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[2] Contrary to the assertion in Arizona's supplemental brief that the *Andrade* motions panel "lifted the stay" (Supp. Br. of Petitioners in Support of Pet. for Writ of Cert. at 2, *Arizona v. Gonzalez* (No. 12-71) [hereinafter "Arizona Supp. Br."]), the panel granted the stay of the district court's injunction orders. *See* Arizona Supp. App. 31, *Andrade* Slip Op. at *10.

With respect to the state law prohibition on photocopying completed voter registration applications before they are submitted to the country registrar, the motions panel concluded that the NVRA only provided third parties the opportunity to photocopy registration applications after they became public records and contained the necessary redactions of private information. *See* Arizona Supp. App. 28, *Andrade* Slip Op. at *9 ("[U]ntil these applications are actually received by a government official, they are not 'public records maintained' by the State.").

Similarly, the motions panel concluded that the state law requirement that volunteer deputy registrars hand deliver completed voter registrations to the county did not run afoul of the NVRA's mandate that states "accept and use" the Federal Form because Texas counties accepted mailed voter registration forms even when they were improperly mailed by volunteer registrars. *See* Arizona Supp. App. 28-29, *Andrade* Slip Op. at *9 ("The NVRA simply does not address the use of mails by third-parties to submit applications.")

The motions panel followed a traditional approach and analyzed whether the challenged state laws and the NVRA could be read "in harmony." Arizona Supp. App. 28 n. 25, *Andrade* Slip Op. at *9 n. 25. Because the state laws regulated in areas separate from those regulated by the NVRA, the statutes were harmonious and there was no conflict.

Nothing in *Andrade* changed the well-established rule in the Fifth Circuit that the Elections Clause preempts state laws that conflict or are inconsistent with federal law. *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000) (concluding that "[b]ecause the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day, we conclude that the Texas early voting scheme is not inconsistent with federal election laws.")

Furthermore, the conflict preemption analysis of the Fifth Circuit motions panel in *Andrade* was very similar to that of the Ninth Circuit in this case. Like the Fifth Circuit, the *Gonzalez* en banc court examined whether Arizona's Proposition 200 could be read in harmony with the NVRA. *See Arizona* App. C at 20c ("If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to 'alter' the state's regulation, and that regulation is superseded.")

Both courts also examined "the scope and application of the federal and state statutes at issue" and sought to determine whether they regulated in the same area. *Compare Arizona* App. C at 20c *with* Arizona Supp. App. 25-30, *Andrade* Slip Op. *8-10. Finally, both courts examined whether the challenged state laws thwarted the purpose of the NVRA. *See Arizona* App. C at 36c and Arizona Supp. App. 28-29, *Andrade* Slip Op at *9.

The difference in outcomes between *Gonzalez* and *Andrade* lies not in the analysis employed by the courts, which is very similar, but in the fact that the *Andrade* panel concluded that the Texas laws did not address the same subject matter as the NVRA. Arizona Supp. App. 27-28, *Andrade* Slip Op. *9. The *Andrade* panel concluded that the photocopy provisions of the NVRA applied only to public records maintained by the state (not voter registration applications prior to their submission to the county registrar) and that the mail provisions of the NVRA addressed mailed registration forms but did not address whether third party volunteers could mail the applications of others. Arizona concedes this point. *See* Arizona Supp. Br. at 2 ("The [*Andrade*] majority held that the NVRA simply does not address this issue.").

In *Gonzalez* the Ninth Circuit used a similar analysis and concluded that "[w]hen read together, the federal and state enactments treat the same subject matter, namely, the procedure for registering by mail to vote in federal elections using the Federal Form, but they do not operate harmoniously." *Arizona* App. C at 30c. The Ninth Circuit went on to identify three areas of conflict between Proposition 200 and the NVRA. *Arizona* App. C at 29c-30c. First, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it is not supplemented with additional documentation. *Arizona* App. C at 31c-32c. Second, Arizona's rejection of

the Federal Form due to lack of additional documentation creates a conflict between state and federal registration procedures and is incompatible with the NVRA's delegation of authority to the U.S. Election Assistance Commission. *Arizona* App. C at 34c. Third, the Ninth Circuit found that Proposition 200 conflicted with the NVRA by undermining the NVRA's goal of streamlining the registration process. *Arizona* App. C at 36c. The Ninth Circuit concluded that "the NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" *Arizona* App. C at 59c (emphasis added). All of these findings are consistent with the approach of the Fifth Circuit motions panel in *Andrade*.

Arizona's argument that the Fifth Circuit limits its Elections Clause preemption analysis to "direct conflict" overlooks the fact that the *Andrade* court was reviewing a finding of direct conflict by the district court. In fact, the *Andrade* court used the same "harmony" test Arizona criticizes as overly-broad in *Gonzalez*. *Compare* Arizona Supp. App. 28 n. 25, *Andrade* Slip Op. at *9 n. 25 ("trying to construe the state and federal laws in harmony") with Arizona Supp. Br. at 4 ("identifying alleged disharmony between federal and state law . . . has no basis in this Court's cases."). Similarly, Arizona's argument that the Ninth Circuit uses a "heightened preemption test" (Arizona Supp. Br. at 4) ignores the multiple direct conflicts between Proposition 200 and the NVRA found by the en banc court.

II. *Andrade* Illustrates the Consistency With Which the Circuits Analyze Elections Clause Preemption and Demonstrates That There is no Conflict in the Circuits

The consistent approach of the Fifth Circuit motions panel and the Ninth Circuit en banc, which includes seeking to harmonize the state and federal statutes and examining the statutes for conflict in language as well as purpose, highlights the lack of division among the circuits in Elections Clause cases. Even Arizona is forced to concede that at most *Andrade* reflects "confusion among these three circuit court judges." Arizona Supp. Br. at 5. In the absence of a circuit split over whether the NVRA preempts state laws adding documentation requirements to the Federal Form, that issue is best left to percolate in the lower courts. In the meantime, review in this Court is premature.

CONCLUSION

Respondents request that the Court deny the Petition for Certiorari.

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AMICUS CURIAE BRIEF

RECORD
AND
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QUESTION PRESENTED

The National Voter Registration Act of 1993 (NVRA) provides that "[e]ach State shall accept and use" a form developed by the United States Election Assistance Commission (EAC) "for the registration of voters in elections for Federal office," 42 U.S.C. 1973gg-4(a)(1), and that the form must require an applicant to affirm her United States citizenship under penalty of perjury, 42 U.S.C. 1973gg-7(b)(2). The question presented is whether the NVRA preempts a requirement under Arizona law to reject an application for voter registration unless the applicant supplies additional proof of United States citizenship beyond the form developed by the EAC.

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INTEREST OF THE UNITED STATES

Under the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, Congress has vested the United States Election Assistance Commission (EAC) with the responsibility of developing a form that States must "accept and use" for the registration of voters for federal elections, 42 U.S.C. 1973gg-4(a)(1), 1973gg-5(a)(4)(A)(iii), 1973gg-7(a)(2). That form must require an applicant to affirm her United States citizenship under penalty of perjury. 42 U.S.C. 1973gg-7(b)(2). This case presents the question whether the NVRA preempts a requirement under Arizona law to reject an application for voter registration unless the applicant supplies additional proof of United States citizenship beyond that form. In addition to its vesting the EAC with responsibility for developing the federal registra-

tion form at issue, the NVRA authorizes the Attorney General to enforce its provisions through civil actions, 42 U.S.C. 1973gg-9(a). The United States therefore has a substantial interest in the resolution of this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-49a.

STATEMENT

1. a. The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, § 4, Cl. 1. The clause "gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Foster* v. *Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)). In regulating the "Manner" of federal elections, Congress may establish uniform rules for, *inter alia*, "notices, *registration*, [and] supervision of voting." *Smiley*, 285 U.S. at 366 (emphasis added); see *Ex parte Siebold*, 100 U.S. 371, 382 (1879) (upholding provisions of Enforcement Act of 1870 regulating registration and voting for federal elections).

b. In 1993, Congress exercised its authority under the Elections Clause to enact the NVRA, which "requires States to provide simplified systems for register-

ing to vote in federal elections." *Young* v. *Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted). Popularly known as the "Motor Voter Act," the NVRA establishes three methods through which citizens may register to vote: (i) "by application made simultaneously with an application for a motor vehicle driver's license"; (ii) "by mail application"; and (iii) "by application in person" at a local registration site or government office. 42 U.S.C. 1973gg-2(a).

Congress enacted the NVRA in response to its concern that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." 42 U.S.C. 1973gg(a)(3). The statute accordingly identifies as its objectives: "increas[ing] the number of eligible citizens who register to vote in elections for Federal office"; "enhanc[ing] the participation of eligible citizens as voters in elections for Federal office"; "protect[ing] the integrity of the electoral process"; and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. 1973gg(b).

For persons who submit applications to vote in federal elections by mail, the NVRA instructs that "each State shall * * * ensure that any eligible applicant is registered to vote in an election * * * if [a] valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election." 42 U.S.C. 1973gg-6(a)(1)(B). The NVRA further provides that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [EAC] * * * for the registration of voters in elections for Federal

office." 42 U.S.C. 1973gg-4(a)(1).[1] States must also make the form developed by the EAC ("Federal Form"), or a form that is "equivalent" to the Federal Form, available for completion at in-person registration sites, 42 U.S.C. 1973gg-5(a)(4)(A) and (6)(A), and, as with mail registration, "ensure that any eligible applicant [who timely submits the form in person] is registered to vote," 42 U.S.C. 1973gg-6(a)(1)(C).

The NVRA limits the information the EAC may require applicants to furnish on the Federal Form. In particular, the form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. 1973gg-7(b)(1). The Federal Form must, however, "include a statement that * * * specifies each eligibility requirement (including citizenship)"; "contains an attestation that the applicant meets each such requirement"; and "requires the signature of the applicant, under penalty of perjury." 42 U.S.C. 1973gg-7(b)(2). Under the later-enacted Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, the form must also include two specific questions, along with check boxes, for the applicant to indicate whether she

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[1] As originally enacted in 1993, the NVRA required the Federal Election Commission (FEC) to prescribe the form. The Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, "transferred to the Election Assistance Commission * * * all functions which the Federal Election Commission exercised under * * * [42 U.S.C.] 1973gg-7(a)," 42 U.S.C. 15532, but neglected to amend a reference to the FEC in Section 1973gg-4.

meets the U.S. citizenship and age requirements to vote, as well as instructions not to complete the form if the answer to either question is no. See 42 U.S.C. 15483(b)(4)(A).

The NVRA additionally authorizes States to develop their own registration forms, which they may provide to citizens as an alternative way to register by mail or in person: "In addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria [for the Federal Form] for the registration of voters in elections for Federal office." 42 U.S.C. 1973gg-4(a)(2). A State therefore may, for example, develop a single form through which citizens can register to vote in federal, state, and local elections.

c. The EAC has developed a Federal Form that meets the requirements of the NVRA and HAVA. See Pet. App. 63c; 11 C.F.R. 9428.3-9428.6. The form "consist[s] of three components: [a]n application, which * * * contain[s] appropriate fields for the applicant to provide all of the information required or requested under [EAC rules]; general instructions for completing the application; and accompanying state-specific instructions" that indicate "the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. 9428.3(a) and (b). The application portion of the Federal Form "[s]pecif[ies] each eligibility requirement," including "U.S. Citizenship," which is "a universal eligibility requirement." 11 C.F.R. 9428.4(b)(1). To complete the form, an applicant must sign, under penalty of perjury, an "attestation * * * that the applicant, to the best of his or her knowledge and belief, meets

each of his or her state's specific eligibility requirements." 11 C.F.R. 9428.4(b)(2) and (3).

The Federal Form's state-specific instructions for Arizona require an applicant to include the number of a valid Arizona driver's license or non-operating identification license (or, if the applicant does not have a license, the last four digits of her Social Security number if she has one), a requirement of HAVA. See Pet. App. 67c; 42 U.S.C. 15483(a)(5)(A)(i). The instructions also inform applicants of Arizona's eligibility requirements, including that the applicant must "be a citizen of the United States" and "be a resident of Arizona * * * at least 29 days preceding the next election." *Id.* at 68c.

2. In 2004, Arizona voters approved a ballot proposition that amended Arizona's election laws in certain respects. Pet. App. 6c-7c. As relevant here, Section 16-166(F) of the Arizona Revised Statutes now requires applicants for registration to furnish proof of U.S. citizenship beyond the attestation requirement of the Federal Form. See Ariz. Rev. Stat. Ann. § 16-166(F) (2006). A county recorder must "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." *Ibid.*

Acceptable proof of citizenship under Section 16-166(F) includes, *inter alia*, the number of a driver's license or non-operating identification license issued after October 1, 1996, by an agency of any U.S. state "if the agency indicates on the * * * license that the person has provided satisfactory proof of United States citizenship"; a photocopy of the applicant's birth certificate or passport; or the applicant's naturalization papers. Ariz. Rev. Stat. Ann. § 16-166(F).

After the ballot initiative's passage, Arizona officials submitted the new requirements to the United States

Department of Justice for "preclearance" under Section 5 of the Voting Rights Act of 1965. See generally *Perry* v. *Perez*, 132 S. Ct. 934, 939-940 (2012). The Department did not interpose an objection to the registration requirement, but, consistent with the scope of its preclearance authority, did not review Section 16-166(F)'s compliance with any other provision of federal law. See *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 476-485 (1997).

In December 2005, Arizona asked the EAC to add the registration requirement set forth in Section 16-166(F) to Arizona's state-specific instructions for the Federal Form. J.A. 181. The agency's Executive Director responded with a letter concluding that Section 16-166(F) was inconsistent with the NVRA. See *id.* at 181-187. He explained that the "NVRA requires States to both 'accept' and 'use' the Federal Form," and that "[a]ny Federal Registration Form that has been properly and completely filled out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." *Id.* at 186. Accordingly, a "state may not mandate additional registration procedures that condition the acceptance of the Federal Form." *Ibid.* In July 2006, the four sitting Commissioners considered whether to incorporate the requirements into the Federal Form, with two voting in favor and two against, failing to meet the statutory three-vote requirement for EAC action. *Id.* at 225; see 42 U.S.C. 15328.[2]

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[2] Petitioners repeatedly suggest, incorrectly, that EAC regulations require the EAC to incorporate any new state-law requirements into the Federal Form unless the Commissioners affirmatively vote not to do so. See Arizona Br. 14-15, 18-19, 34-35. The regulation that they cite merely states that "[e]ach chief state election official shall notify

3. a. Respondents filed lawsuits seeking to bar the enforcement of the registration requirement (and other provisions not relevant here). See Pet. App. 7c. After the district court denied their request for a preliminary injunction, the Ninth Circuit enjoined the requirement in light of the imminent 2006 election. See *id.* at 7c-8c. This Court vacated that injunction on the ground that the court of appeals had failed to explain why it had concluded that the district court's ruling was incorrect, emphasizing that it "express[ed] no opinion * * * on the ultimate resolution of these cases." *Purcell* v. *Gonzalez*, 549 U.S. 1, 5 (2006). On remand from this Court, the court of appeals affirmed the district court's denial of a preliminary injunction. See Pet. App. 8c, 1d-21d. The district court then granted Arizona's motion for summary judgment on the challenge to the registration requirement. See *id.* at 8c. A divided panel of the court of appeals reversed that holding, see *id.* at 1a-106a, and the court of appeals voted to rehear the case en banc, see *id.* at 1b-6b.

b. The en banc court of appeals held that "the NVRA supersedes [Section 16-166(F)] as that provision is applied to applicants using the [Federal] Form to register to vote in federal elections." Pet. App. 6c.

The court first concluded, after canvassing this Court's precedents, that no "presumption against preemption" applies to a statute enacted under Congress's Elections Clause authority. Pet. App. 16c-17c. Rather, a court must ask whether the federal statute "addresse[s] the same subject as the state law" and "has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a

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the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements." 11 C.F.R. 9428.6(c).

subsequent enactment by the same legislature." *Id.* at 20c (citing *Foster*, 522 U.S. 67; *Siebold*, 100 U.S. 371).

Applying that standard, the court held that the NVRA and Section 16-166(F) "do not operate harmoniously." Pet. App. 30c. The NVRA, it explained, "requires a county recorder to accept and use the Federal Form to register voters for federal elections, whereas [Section 16-166(F)] requires the same county recorder to reject the Federal Form as insufficient for voter registration if the form does not include proof of U.S. citizenship." *Ibid.* The court further found that Section 16-166(F) "is discordant with the NVRA's goal of streamlining the registration process" because "much of the value of the Federal Form in removing obstacles to the voter registration process is lost" if applicants must submit whatever additional documentation a State may require. *Id.* at 36c-37c.

Two members of the en banc court dissented. Pet. App. 100c (Rawlinson, J., concurring in part and dissenting in part). They believed that because the NVRA authorizes States to develop their own registration forms, it "creates a minimum standard through the Federal Form and allows a state to require more." *Id.* at 102c.

SUMMARY OF ARGUMENT

The NVRA prohibits a State from imposing additional requirements on applicants who seek to register for federal elections through the Federal Form.

A. 1. The text of the NVRA requires a State to register an eligible applicant who timely submits a completed Federal Form, and it establishes that the Federal Form supplies the information that state officials need to confirm eligibility. The statute instructs the EAC to develop a "registration application" form that includes

the "information * * * necessary to enable the appropriate State election official to assess the eligibility of the applicant," 42 U.S.C. 1973gg-7(a)(2) and (b)(1), and provides that States "shall accept and use" that form "for the registration of voters in elections for Federal office," 42 U.S.C. 1973gg-4(a)(1). It then specifies exactly how a State must "use" the form: "In the administration of voter registration for elections for Federal office, each State *shall* * * * *ensure that any eligible applicant is registered to vote* in an election * * * if the valid voter registration form of the applicant is [timely mailed]." 42 U.S.C. 1973gg-6(a)(1)(B) (emphasis added). Thus, once state officials receive a timely, completed Federal Form—which the EAC has determined provides them with the information that they need to confirm the applicant's eligibility—they "shall" register any eligible applicant to vote in federal elections.

Section 16-166(F), which requires Arizona election officials to "reject any application for registration that is not accompanied by" what the State defines as "satisfactory evidence of United States citizenship," squarely conflicts with the command of federal law and is therefore preempted. Because federal law requires Arizona officials to register voters that Arizona law does not permit them to register—those who submit a properly completed Federal Form indicating their eligibility but who submit no additional information or documentation verifying U.S. citizenship—the officials' "compliance with both state and federal law is impossible." *United States* v. *Locke*, 529 U.S. 89, 109 (2000) (citation omitted).

Petitioners' interpretation of the NVRA, under which the Federal Form is necessary but not sufficient for registration, would thwart the central purpose of the

statute: to streamline the process of registering to vote for federal office. If each State could supplement the Federal Form with any additional registration requirements it deemed advisable—dozens of pages of additional forms encompassing multiple eligibility requirements, for example—the Federal Form, far from streamlining registration, would instead become a further hurdle to registering to vote beyond whatever requirements States decide to impose. Particularly in a statute designed to remedy States' "discriminatory and unfair registration laws and procedures," 42 U.S.C. 1973gg(a)(3), that cannot be what is meant by the command that States "shall accept and use" the Federal Form.

Interpreting the NVRA to permit States to supplement the Federal Form with additional requirements would also be inconsistent with the role the statute assigns to the EAC. Congress has given the EAC authority to determine, after consultation with state officials, what information is necessary to enable state officials to assess the eligibility of applicants, 42 U.S.C. 1973gg-7(a)(2) and (b)(1), and has made clear that such determinations will impose binding legal requirements on the States, 42 U.S.C. 15329. Under petitioners' view, however, the EAC's determinations would be effectively advisory.

2. Petitioners' arguments largely rest on a basic misunderstanding about the States' role in the statutory scheme. They repeatedly assert that the States may add state-specific registration requirements to the Federal Form—going so far as to describe that proposition as "undisputed," Arizona Br. 35—but that is a misreading of the statute. As the plain text of the NVRA makes clear, it is the EAC, not Arizona or any other State, that has the authority to determine what information must

be furnished on the Federal Form. 42 U.S.C. 1973gg-7(a)(2) and (b)(1). Although the EAC must include information enabling state officials to assess the applicant's eligibility and must consult state officials in developing the form, it is not bound by a State's conclusion that certain information or documentation is necessary to establish a particular qualification.

3. Petitioners also argue that Section 16-166(F) advances some of the objectives of the NVRA by enhancing the integrity of federal elections. But their interpretation of the statute would frustrate its core purpose, because it would mean that the Federal Form requirement does little to simplify the process of registering to vote. There is no basis for concluding that Congress would have found that result acceptable in exchange for the possibility that some States *might* enact additional requirements enhancing the integrity of federal elections. Rather, the NVRA itself promotes its various objectives, in part through a number of provisions designed to prevent and deter voter fraud.

B. Because Congress enacted the NVRA under its Elections Clause authority, the court of appeals correctly declined to apply any "presumption against preemption." That presumption rests on the principle that it should not lightly be inferred that Congress intended to interfere with the States' traditional police powers. But the States had no power to regulate federal elections before the Constitution delegated it to them. *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001). That historical backdrop forecloses any justification for applying a special presumption against preemption. In any event, the NVRA's plain text, particularly considered in connection with the statute's purposes, readily overcomes any such presumption.

C. Although the clarity of the enacted text makes resort to the NVRA's drafting history unnecessary, that history confirms that States may not supplement the Federal Form with additional proof-of-citizenship requirements. The full Congress deleted a provision in the Senate's version of the bill providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993). The conference report explained that the provision was "not necessary or consistent with the purposes of this Act" in part because it could be interpreted to authorize state requirements that impede voter registration. H.R. Rep. No. 66, 103d Cong., 1st Sess. 23 (1993). That history fortifies the conclusion that the NVRA preempts a State from imposing, as a precondition to registration through the Federal Form, additional proof-of-citizenship requirements beyond that form.

D. Petitioners' constitutional-avoidance argument—that if the NVRA preempts Section 16-166(F), it would infringe the States' exclusive authority to set voter qualifications—is unfounded. Petitioners misread the text of the pertinent provisions of the Constitution and disregard this Court's longstanding, "commonsense view" that the Elections Clause power "encompasses matters like * * * 'registration.'" *Cook*, 531 U.S. at 523 (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)). Indeed, if petitioners are correct that the procedures by which a voter's qualifications are verified are themselves state-determined "Qualifications" under the relevant provisions of the Constitution, Congress would lack authority under the Elections Clause to promulgate the Federal Form requirement at all.

ARGUMENT

THE NVRA PREEMPTS ARIZONA'S IMPOSITION OF ADDITIONAL PROOF-OF-CITIZENSHIP REQUIREMENTS BEYOND THE FEDERAL FORM

The court of appeals correctly concluded that Arizona's requirement that the Federal Form be rejected unless accompanied by additional information or documentation conflicts with the NVRA and is therefore preempted. Petitioners' contrary view not only misinterprets the text of the NVRA and the States' role within the statutory scheme, but it reads a law designed "to provide simplified systems for registering to vote in federal elections" to do little more than erect an additional barrier to registration. *Young* v. *Fordice*, 520 U.S. 273, 275 (1997) (emphasis omitted).

A. Section 16-166(F) Conflicts With The Text, Structure, And Purpose Of The NVRA

The NVRA does not permit a State to impose additional requirements on applicants who seek to register for federal elections through the Federal Form.

1. a. The relevant provisions of the NVRA are straightforward. The statute instructs the EAC to develop a "registration application" form that includes the "information * * * necessary to enable the appropriate State election official to assess the eligibility of the applicant," 42 U.S.C. 1973gg-7(b)(1), and provides that States "shall accept and use" that form "for the registration of voters in elections for Federal office," 42 U.S.C. 1973gg-4(a)(1). It then specifies exactly how a State must "use" the form: "In the administration of voter registration for elections for Federal office, each State *shall * * * ensure that any eligible applicant is registered to vote* in an election * * * if the valid voter reg-

istration form of the applicant is [timely mailed]." 42 U.S.C. 1973gg-6(a)(1)(B) (emphasis added). Thus, once state officials receive a timely, completed Federal Form—which the EAC has determined provides the information they need to assess the applicant's eligibility—they "shall" register any eligible applicant to vote in federal elections.

Section 16-166(F) conflicts with that command. Arizona election officials must "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship" as defined by that provision, including, for certain applicants, additional documentation. Ariz. Rev. Stat. Ann. § 16-166(F) (2006). The officials therefore must "reject" certain applications—those unaccompanied by additional information or documentation—that federal law requires them to "accept and use" by "ensur[ing] that [the] applicant is registered to vote in an election." This is therefore not merely a case in which the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress," although Section 16-166(F) certainly impedes the simplification goals of the NVRA. *United States* v. *Locke*, 529 U.S. 89, 109 (2000) (citation omitted). Here, "compliance with both state and federal law is *impossible*" because federal law requires state officials to register applicants who submit a properly completed Federal Form indicating their eligibility without additional proof of citizenship, while state law bars them from doing so. *Ibid.* (citation omitted; emphasis added).

Petitioners appear to read the NVRA to make the Federal Form merely *necessary* for federal voter registration, but not *sufficient* if a State chooses to impose additional requirements. See Arizona Br. 39-40 (arguing

that the Federal Form is not "conclusive of voter eligibility"). To support that view, they argue that in certain linguistic contexts, a statement that one will "accept and use" a document for a given purpose does not necessarily establish that the document is sufficient to achieve that purpose. See *id.* at 3-4, 39-40. But petitioners' argument ignores that the NVRA specifically identifies what state election officials must do whenever they receive a timely, completed Federal Form indicating an applicant's eligibility: They must ensure the applicant is registered to vote in federal elections. 42 U.S.C. 1973gg-6(a)(1)(B) and (C). That requirement leaves no room for the State to reject certain applications based on the failure to include additional information or documentation verifying eligibility beyond what the Federal Form requires.

Moreover, the statutory provision that immediately follows the requirement that States "accept and use" the Federal Form, which authorizes a State to "develop and use" an alternative form "[i]n addition to accepting and using" the Federal Form, 42 U.S.C. 1973gg-4(a)(2), confirms the sense in which the statute contemplates that a State will "use" the forms. Given that the state-developed form, like the Federal Form, may require only the information that is essential to determine eligibility and administer the election process, 42 U.S.C. 1973gg-7(b)(1), Congress must have understood that submission of the Federal Form or the state-developed form would be sufficient for registration. Otherwise, the State could condition registration on the submission of information that, even in the State's own judgment, is not necessary to assess an applicant's eligibility to vote.

b. Even assuming the command that the States "shall accept and use" the Federal Form could be read

in isolation to allow States to impose additional registration requirements, that interpretation could not be squared with the context and structure of the statute. It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used," *Deal* v. *United States*, 508 U.S. 129, 132 (1993), and "[t]hat is particularly true of a word as elastic as 'use,'" *Smith* v. *United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting). The pertinent context here is a statute expressly intended to combat "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office," 42 U.S.C. 1973gg(a)(3), and that is replete with provisions obviously intended to make it easier for citizens to register to vote in federal elections, such as the requirements that States allow citizens to register through driver's license applications, 42 U.S.C. 1973gg-3(a)(1), and keep registration periods open until 30 or fewer days before an election, 42 U.S.C. 1973gg-6(a)(1).

If the Federal Form could be supplemented by any further registration requirements that States deemed worthwhile, the statute would thwart rather than advance its central objective of "provid[ing] simplified systems for registering to vote in federal elections." *Young*, 520 U.S. at 275 (emphasis omitted). The essential function of the Federal Form then would no longer be to streamline voter registration but instead would be to add an additional hurdle to whatever registration requirements the States decide to impose. Indeed, under petitioner's approach, each State could impose all manner of its own supplemental requirements beyond the Federal

Form. Those requirements could encompass voluminous documentary or informational demands, and could extend to any eligibility criteria beyond citizenship, such as age, residency, mental competence, or felony history.

That cannot be what is meant by the command that States "shall accept and use" the Federal Form. To adopt petitioners' interpretation, one would have to believe that Congress was more concerned that States were neglecting to solicit information that was necessary to confirm eligibility than that they were erecting "discriminatory and unfair registration laws and procedures." 42 U.S.C. 1973gg(a)(3). There is no support for that view in the text of the statute; the *National Voter Registration* Act's principal objective is indisputably to establish a streamlined registration process that avoids undue state-by-state variation. Accordingly, even if the text of the NVRA did not itself establish that submission of the Federal Form is sufficient for registration, that reading is compelled by the statute's purposes.

c. Petitioners' reading of the statute is also at odds with the role that the statute assigns to the EAC. The EAC is required, "in consultation with the chief election officers of the States," to determine what "identifying information * * * and other information * * * is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. 1973gg-7(a)(2) and (b)(1). The statutory scheme thus contemplates that the EAC will have the final word on what information is "necessary" to confirm voter eligibility and that the Federal Form will require submission of that information. Under petitioners' view, however, each State would be the ultimate arbiter of what information is necessary to assess eligibility, since each State could impose whatever additional requirements it saw fit, rendering the EAC's principal function effectively advisory. That would be an unacceptable reading of the

statute, particularly given that Congress expressly understood that the EAC's development of the Federal Form would "impose[] * * * requirement[s] on * * * State[s]." 42 U.S.C. 15329.

For much the same reason, the dissent in the court of appeals erred in concluding that the provision of the NVRA authorizing States to develop their own registration forms permits States to supplement the EAC-developed Federal Form with additional requirements. See Pet. App. 102c. The relevant provision authorizes States to use a state-developed form "[i]n addition to"—not "in conjunction with" or "in lieu of"—"accepting and using the [Federal] [F]orm." U.S.C. 1973gg-4(a)(2). Thus, a State may develop a form that citizens can use to register for federal elections—for example, a unified form enabling registration for federal, state, and local elections—but it must continue to "accept and use" the Federal Form for citizens who choose to register for federal elections in that way. That States may develop and use their own registration form as an *alternative* to the Federal Form does not suggest that States may impose all manner of additional requirements on an applicant who completes the Federal Form beyond what the EAC has established.

2. Petitioners' argument that the NVRA permits States to supplement the Federal Form with additional registration requirements reflects a basic misunderstanding about the role of the States in the statutory scheme. Petitioners assert, for example, that "[i]t is undisputed that the NVRA contemplates that the *States* may require that applicants provide state-specific information with the Federal Form." Arizona Br. 35 (emphasis added); see also *id.* at 27. That is not so. The statute authorizes the EAC, not the States, to create the Federal Form and therefore to determine the "information * * * necessary to enable the appropriate

State election official to assess the eligibility of the applicant." 42 U.S.C. 1973gg-7(a)(2) and (b)(1). Although the EAC must "consult[] with the chief election officers of the States" in developing the form, 42 U.S.C. 1973gg-7(a)(2), the statutory text could not reasonably be read to authorize States themselves to disagree with the EAC's determination of what information must be included on the Federal Form.

Petitioners also rely on EAC rules implementing the statutory requirement. See Arizona Br. 35-36. But those rules explain only that the forms must include "state-specific instructions"—*i.e.*, instructions *approved by the EAC* that require an applicant to supply information necessary to establish compliance with state-specific eligibility requirements. 11 C.F.R. 9428.2(a). They do not say that each State itself may impose additional burdens beyond the EAC-developed Federal Form for registration for federal elections. In fact, Arizona was told just the opposite by the Executive Director of the EAC; he explained that "Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." J.A. 187; see *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Nor, as petitioners contend, did this Court suggest in *Young* v. *Fordice*, *supra*, that States have the authority to decide what information must be included on the Federal Form. See Arizona Br. 38. In the passage from *Young* that they quote, the Court was discussing only a State's "policy choice[s]" in developing its *own* alternative forms under the NVRA, not the Federal Form. See 520 U.S. at 286.

To be sure, States retain discretion to establish, within constitutional bounds, eligibility requirements for their citizens, such as residency requirements (and, in any case, U.S. citizenship is a "universal eligibility requirement" under EAC regulations). 11 C.F.R. 9428.4(b); see Pet. App. 67c-84c. But the "information * * * [that] is necessary to enable the appropriate State election official to assess the eligibility of the applicant" is not itself an eligibility requirement. 42 U.S.C. 1973gg-7(b)(1). Rather, Congress has given the EAC the authority to determine what information is necessary to determine eligibility as part of Congress's power to establish the procedures for registration in federal elections. See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). The EAC has concluded that the appropriate way to certify compliance with eligibility requirements, including U.S. citizenship, is to require the applicant to submit the relevant identification number under HAVA, make "an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements," and sign the application "under penalty of perjury." 11 C.F.R. 9428.4(b)(2) and (3); see also 59 Fed. Reg. 32,311 (June 23, 1994) (original promulgation of Federal Form). The NVRA does not leave room for States unilaterally to impose additional prerequisites to registration beyond the Federal Form.[3]

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[3] Petitioners, for similar reasons, err in relying on a provision barring inclusion in the form of any requirement for notarization or formal authentication. See Arizona Br. 27-28; 38-39. Although the fact that the NVRA forbids the *EAC* from including a notarization requirement in the Federal Form, see 42 U.S.C. 1973gg-7(b)(3), might support the inference that the EAC may require other forms of

3. Petitioners further argue that Section 16-166(F) advances some of the objectives of the NVRA—in particular the goals of "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. 1973gg(b)(3) and (4); Arizona Br. 41-42. Congress, they contend, would not have intended to preempt any state requirements that purport to promote those objectives.

For the reasons discussed above, however, petitioners' position would eviscerate the central purpose of the statute to streamline the process of registering to vote; it would mean that all that Congress accomplished through the statute's mail and in-person registration provisions was to engraft an additional Federal Form requirement onto whatever requirements individual States choose to impose. It is implausible that Congress would have found that result acceptable in exchange for the possibility that some States *might* enact additional requirements enhancing the integrity of federal elections—particularly in a statute designed to remedy States' perceived "discriminatory and unfair registration laws and procedures." 42 U.S.C. 1973gg(a)(3). Rather, the NVRA itself promotes the objectives of expanding voter registration and ensuring electoral integrity. The statute does so through, for example, provisions requiring attestation under penalty of perjury, 42 U.S.C. 1973gg-7(b)(2)(A) and (B), instructing each State to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters," 42 U.S.C. 1973gg-6(a)(4), and prescribing criminal penalties for "the procurement or submission of voter registration

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proof, the *States* have no authority to design the Federal Form in the first place.

applications that are known by the person to be materially false, fictitious, or fraudulent," 42 U.S.C. 1973gg-10(2)(A).

Other provisions of federal law also operate to prevent and deter voter fraud. HAVA requires a person voting for the first time in a State who registers by mail to provide specified identification documents either at the time of voting or with a mail registration form if the State cannot match the person's driver license or social-security number with state records. 42 U.S.C. 15483(b)(1)-(3). And a number of statutes prescribe criminal and civil penalties for aliens who unlawfully vote or submit false information when attempting to register to vote. See 8 U.S.C. 1227(a)(6); 8 U.S.C. 1182(a)(10)(D); 18 U.S.C. 611; 18 U.S.C. 1015(f); 42 U.S.C. 15544(b). Congress and the EAC could reasonably have concluded that no additional proof requirements are necessary to ensure the integrity of elections in light of these safeguards.

Finally, petitioners speculate that under the court of appeals' interpretation of the NVRA, state officials would be required to grant registration to any person who submits a completed Federal Form, "even if state officials had documentary proof that the applicant was not a citizen." Arizona Br. 18. That is incorrect. While submission of a completed Federal Form serves to complete the application for registration, such that the applicant need not supply any additional information, the purpose of the form is "to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. 1973gg-7(b)(1). The statute gives the EAC the authority to determine what information is necessary to make that determination, but it contemplates that state officials will use the submitted information to confirm

whether the applicant is eligible to vote—such as by cross-checking it against public records. That is why the statute requires state officials "to send notice to each applicant of the disposition of the application." 42 U.S.C. 1973gg-6(a)(2). Although state officials may not require an applicant to submit additional information as a precondition to registration, they can deny registration based on information in their possession establishing the applicant's ineligibility.

B. No Presumption Against Preemption Applies In The Election Clause Context, But Even If A Presumption Applied, It Would Be Overcome Here

As this Court has explained, "it is well settled that the Elections Clause grants Congress the power to override state regulations." *Foster*, 522 U.S. at 69 (internal quotation marks and citation omitted).[4] As a result, any Elections Clause "regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ibid.* (quoting *Ex parte Siebold*, 100 U.S. 371, 384 (1879)). See, *e.g.*, *Siebold*, 100 U.S. at 382 (upholding federal legislation regulating, *inter alia*, registration). Petitioners argue that, in concluding that Section 16-166(F) conflicts with the NVRA, the court of appeals "aban-

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[4] Although the Elections Clause by its terms refers only to congressional elections, and Article II of the Constitution authorizes state legislatures to "appoint, in such Manner as the Legislature thereof may direct, * * * [presidential] Electors," U.S. Const. Art. II, § 1, Cl. 2, "this Court in *Burroughs* v. *United States*, 290 U.S. 534 (1934) * * * reject[ed] a construction of [that provision] that would have curtailed the power of Congress to regulate [presidential] elections." *Oregon* v. *Mitchell*, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.).

doned the principles traditionally governing preemption and fashioned a new approach" for Elections Clause cases. Arizona Br. 29. The court of appeals, however, adhered to the preemption framework set forth in this Court's precedents.

The court of appeals held that where a federal Elections Clause enactment addresses the same subject as a state law, a court should ask whether the federal law "has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature" and should invalidate the state act only if "the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." Pet. App. 20c. That standard closely tracks this Court's description of Elections Clause preemption in *Siebold*. See 100 U.S. at 384 ("There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature."); *id.* at 386 (explaining that the state law is valid unless there is a "conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such").

Indeed, the standard articulated by the court of appeals does not appear to differ materially from the ordinary standard for conflict preemption, in which a court asks whether "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Locke*, 529 U.S. at 109 (internal quotation marks and citation omitted). And the court of appeals' actual holding—that "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Fed-

eral Form"—fits readily within this Court's conflict-preemption framework. Pet. App. 31c. Although petitioners strenuously argue that the court of appeals established a "new test for analyzing elections preemption [that] does not require an actual conflict between state and federal law," Arizona Br. 22-23, the decision below ultimately rested on "the conflict between the state and federal procedures," Pet. App. 34c.

To be sure, the court of appeals did conclude that no "presumption against preemption" or "plain statement rule" should apply in the Elections Clause context. Pet. App. 16c-17c. But that ruling was correct. This Court has never applied a weight on the scale against preemption in its Elections Clause analysis or in other contexts where the subject matter is "inherently federal in character." *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); see *Foster* v. *Love*, 522 U.S. 67 (1997); *Siebold*, *supra*. The presumption against preemption rests on the principle that "the historic police powers of the States [a]re not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unlike other powers exercisable by the States, however, the power to regulate federal elections "had to be delegated to, rather than reserved by, the States" because "[t]he federal offices at stake aris[e] from the Constitution itself," and "any state authority to regulate election to those offices could not precede their very creation by the Constitution." *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001) (internal quotation marks and citation omitted; brackets in original). An Elections Clause enactment thus does not supersede the historic police powers of the States, and therefore no justification exists for courts to demand a clear statement when "Con-

gress sees fit to exercise" its "paramount" power in this area, *Siebold*, 100 U.S. at 384.[5]

Moreover, unlike a federal statute that regulates citizens directly, and therefore may leave open the question whether Congress sought to displace state law addressing the same subject matter, an Elections Clause enactment like the NVRA is designed to regulate the conduct of States themselves in administering federal elections. In that context, there is no sound reason to presume that Congress would be reluctant to displace state law that is inconsistent with the operation or purpose of the federal statute.

In any event, even if a presumption against preemption applied here, Section 16-166(F) could not stand. The terms of the NVRA require a State to register an eligible applicant who submits a timely, completed Federal Form, and the statute makes clear that the Federal Form supplies the information that state officials need to evaluate an applicant's eligibility. Congress has thus "made clear its desire for pre-emption" of additional state-imposed requirements, overcoming any contrary

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[5] Petitioners misread a passage from *Siebold* in which the Court stated that it was "bound to presume that Congress has [exercised its Elections Clause power] in a judicious manner" as invoking a presumption against preemption. Arizona Br. 31 (quoting 100 U.S. at 393). The Court, in fact, was stating the opposite: that the Judiciary should afford Congress a degree of deference in its determination that the challenged statute did not exceed the bounds of the Elections Clause, in line with the "presumption that [C]ongress will pass no act not within its constitutional power." *United States* v. *Harris*, 106 U.S. 629, 635 (1883). And although petitioners rely on what they claim to be this Court's approval of the Fifth Circuit's analysis in *Foster*, see Arizona Br. 32-33 & n.6, that opinion did not apply a presumption against preemption either. See *Love* v. *Foster*, 90 F.3d 1026 (5th Cir. 1996).

presumption. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 151 (2001).

C. Congress Rejected An Amendment That Would Have Authorized States To Add Requirements For Proof Of Citizenship

Because the text of the NVRA forbids a State from imposing additional registration requirements beyond the Federal Form, there is no need to consult the statute's drafting history to resolve the question presented. See *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012). But to the extent the Court reviews that history, it confirms that Congress understood the enacted text to foreclose States from conditioning registration on further proof of citizenship.

The NVRA's legislative reports generally reflect what is obvious from the text: that the core objective of the statute is to make it easier to register to vote in federal elections. The House committee report explains that the principal purpose of the NVRA is to address "difficulties encountered by eligible citizens in becoming registered to vote" and to "make the registration process more accessible," citing "extensive hearings" in which "the Committee heard a variety of witnesses testify that registration procedures in the United States were not uniform, were not nondiscriminatory and, in some cases, were interpreted in such a manner as to deny eligible citizens their right to vote." H.R. Rep. No. 9, 103d Cong., 1st Sess. 3-4 (1993) (House Report). The Senate committee report on that chamber's version of the bill similarly states that the "legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act." S. Rep. No. 6, 103d Cong., 1st Sess. 3 (1993) (Senate Report). With respect

to mail registration specifically, each report explains that "[i]n those States that develop their own mail voter registration applications, an applicant may use, and the State must accept, *either* the national form developed by the [EAC] *or* the State's own form." House Report 10 (emphases added); see Senate Report 26.

The dissenting members of the Senate committee objected to the bill's mail-registration provisions precisely because, in their view, the bill would "forbid[] precautions states may take to reduce the chance of the unscrupulous taking advantage of the system," such as "asking applicants to supply identification to determine that persons registering are who they claim to be or live where they say they do." Senate Report 52-53. Fraudulent registration by non-citizens in particular, they argued, "might be combated by requiring proof of citizenship at the time of registration," but "mail registration under this bill would preclude such corrective action." *Id.* at 55; see also House Report 35 (minority views) (arguing that bill "limit[ed] the state's ability to confirm independently the information contained in voter registration applications"). The dissenters believed that the bill would preempt preexisting state requirements in Connecticut and New Hampshire requiring a "birth certificate, driver's license, or Social Security card to be shown at the time of registration." Senate Report 53.

In response to that concern, once the bill reached the floor of the Senate, a one-sentence amendment was added providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993). Senator Simpson, who introduced one of two identical versions of the amendment, stated that the amendment

would "allow[] States to check documents to verify citizenship." *Ibid.* Citing "several instances where voter registration materials were or may have been used to register noncitizens to vote" in California, he "offer[ed] [the] amendment to try to ensure that States will continue to have the right, if they wish, to require documents verifying citizenship." *Id.* at 5099.[6]

In reconciling the House and Senate bills, however, the conference committee deleted the Senate's amendment on the ground that it was "not necessary or consistent with the purposes of this Act." H.R. Rep. No. 66, 103d Cong., 1st Sess. 23 (1993). The committee was concerned that the amendment would "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program" and could "adversely affect the administration of the other registration programs as well." *Ibid.*

In light of "Congress' rejection of the very language that would have achieved the result [Arizona] urges here," the drafting history of the NVRA "weighs heavily against [petitioners'] interpretation" of the statute. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 579-580 (2006) (citing *Doe* v. *Chao*, 540 U.S. 614, 621-623 (2004)); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (cita-

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[6] Senator Ford, the bill's sponsor, objected to the amendment on the ground that, in his view, it was "redundant" since "there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship." 139 Cong. Rec. 5099. There is no indication that other members of Congress shared his interpretation.

tion omitted). Congress considered whether to allow States to impose additional proof-of-citizenship requirements and ultimately concluded that doing so would not comport with the central objectives of the legislation.

D. Petitioners' Constitutional Arguments Do Not Support Their Reading Of The NVRA

Petitioners finally contend that this Court must interpret the NVRA to permit States to add registration requirements beyond the Federal Form to avoid a serious constitutional question. See Arizona Br. 48-56. Even if the NVRA were open to petitioners' reading, their constitutional-avoidance argument is without merit. According to petitioners, if the NVRA makes the Federal Form sufficient for voter registration, it would exceed Congress's power under the Elections Clause and violate the clauses of the Constitution requiring that the "Qualifications" of voters for the House and Senate be the same as the qualifications of voters for the largest house of the state legislature and authorizing state legislatures to appoint presidential electors. See U.S. Const. Art. I, § 2, Cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); see also U.S. Const. Amend. XVII; U.S. Const. Art. II, § 1, Cl. 2. Petitioners evidently believe that the term "Qualifications" in the Constitution encompasses not only personal characteristics like age, residency, and mental competency, see 11 C.F.R. 9428.6(a), but also the *means* by which voters prove those characteristics in the registration process.

Petitioners' constitutional argument has no support in the text of the Constitution, the historical materials they cite, or this Court's precedents. At the time of the

Founding, as now, the word "qualifications" connoted personal characteristics of voters, not the procedures or evidence by which they demonstrate those characteristics. See, *e.g.*, Noah Webster, *American Dictionary of the English Language* (1st ed. 1828) (Qualification: "Any natural endowment or any acquirement which fits a person for a place, office or employment, or enables him to sustain any character with success"; "Legal power or requisite; as the qualifications of electors."). The text of the Constitution confirms that meaning. Each house of Congress is given the power to "be the Judge of the * * * Qualifications of its own Members." U.S. Const. Art. I, § 5, Cl. 1. The procedures that the chambers adopt to "[j]udge" those qualifications—for example, what evidence is required to demonstrate that a representative has "been seven Years a Citizen of the United States," U.S. Const., Art. I, § 2, Cl. 2—therefore could not be "Qualifications" themselves. Nor do any of the Founding-era documents that petitioners cite indicate that the procedures by which voters verify their qualifications are themselves "Qualifications" that must be defined by state law. See The Federalist No. 60 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the federal government lacks the power to "prescribe[e] qualifications of property").

For eighty years, moreover, this Court has expressed the "commonsense view" that the phrase "Manner of holding Elections" in the Elections Clause "encompasses * * * registration." *Cook*, 531 U.S. at 523 (internal quotation marks and citation omitted); see *Roudebush* v. *Hartke*, 405 U.S. 15, 24 (1972); *Smiley*, 285 U.S. at 366. The statute upheld in *Siebold*, in fact, regulated both registration and voting in federal elections, and the Court did not suggest that its constitutionality was lim-

ited to the latter. See 100 U.S. at 379-382. In the NVRA, Congress has not established any voter "Qualifications," but has merely authorized the EAC to determine the information that a person must submit to establish that she meets the applicable state-law qualifications during the registration process. If a State could simply re-characterize such registration procedures as voter "Qualifications," it could circumvent Congress's plenary authority under the Elections Clause to set the rules for voter registration in federal elections.

Petitioners' argument would also prove too much. If the information voters must submit to verify that they meet state eligibility requirements itself constitutes a voter "Qualification[]," and if the authority to set voter qualifications is "assign[ed] * * * to the States exclusively," Arizona Br. 51, Congress would lack authority to establish the Federal Form requirement at all. The principal contents of the Federal Form are, after all, the "identifying information * * * and other information" that the EAC finds "necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. 1973gg-7(b)(1). Were the submission of such information itself properly characterized as a voter "Qualification[]" beyond Congress's power to prescribe, the entire scheme would be unconstitutional. Nor could Congress, for instance, provide for use of a standard federal form for registration of service members stationed overseas, as Congress has done in the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff(b)(2), 1973ff-1(a)(4). There is no basis for that cramped understanding of Congress's authority under the Elections Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Article I, Section 4, Clause 1 of the United States Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2. Section 1973gg of Title 42 of the United States Code provides:

Findings and purposes

(a) Findings

The Congress finds that—

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are—

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

3. Section 1973gg-2 of Title 42 of the United States Code provides:

National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office—

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person—

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

(b) Nonapplicability to certain States

This subchapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this subchapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

4. Section 1973gg-4 of Title 42 of the United States Code provides:

Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if—

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person—

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title.

5. Section 1973gg-5 of Title 42 of the United States Code provides:

Voter registration agencies

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies—

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include—

(i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not—

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall—

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance—

(i) the mail voter registration application form described in section 1973gg-7(a)(2) of this title, including a statement that—

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 1973gg-7(a)(2) of this title,

unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes—

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with _____.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registra-

tion application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation

All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a) of this section, and all nongovernmental entities are encouraged to do so.

(c) Armed Forces recruitment offices

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) of this section for all purposes of this subchapter.

(d) Transmittal deadline

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration

agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

6. Section 1973gg-6 of Title 42 of the United States Code provides:

Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall—

(1) ensure that any eligible applicant is registered to vote in an election—

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not

later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section;

(5) inform applicants under sections 1973gg-3, 1973gg-4, and 1973gg-5 of this title of—

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration, application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) of this section to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) of this section by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's

jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) of this section to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the pe-

riod beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant—

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is main-

tained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official

list of eligible voters by reason of such a change of address except as provided in subsection (d) of this section.

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 1973gg-8 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include—

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means—

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

7. Section 1973gg-7 of Title 42 of the United States Code provides:

Federal coordination and regulations

(a) In general

The Election Assistance Commission—

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2) of this section—

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that—

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application—

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that i f an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

8. Section 15328 of Title 42 of the United States Code provides:

Requiring majority approval for actions

Any action which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members.

9. Section 15329 of Title 42 of the United States Code provides:

Limitation on rulemaking authority

The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 1973gg-7(a) of this title.

10. Section 15483 of Title 42 of the United States Code provides:

Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter

in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters—

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg- 6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) **Conduct**

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that—

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to

registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of this title (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if—

(A) the individual registered to vote in a jurisdiction by mail; and

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a) of this section.

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual—

(i) in the case of an individual who votes in person—

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot—

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of

subparagraph (A)(i), may cast a provisional ballot under section 15482(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 15482(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person—

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either—

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either—

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is—

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(ii) provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the

applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) of this section shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) of this section on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and

includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) of this section on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) of this section shall apply to any individual who registers to vote on or after January 1, 2003.

11. Section 9428.2 of Title 11 of the Code of Federal Regulations provides:

Definitions.

As used in this part:

(a) *Form* means the national mail voter registration application form, which includes the registration application, accompanying general instructions for completing the application, and state-specific instructions.

(b) *Chief state election official* means the designated state officer or employee responsible for the coordination of state responsibilities under 42 U.S.C. 1973gg-8.

(c) *Active voters* means all registered voters except those who have been sent but have not responded to a confirmation mailing sent in accordance with 42 U.S.C. 1973gg-6(d) and have not since offered to vote.

(d) *Inactive voters* means registrants who have been sent but have not responded to a confirmation mailing sent in accordance with 42 U.S.C. 1973gg-6(d) and have not since offered to vote.

(e) *Duplicate registration application* means an offer to register by a person already registered to vote at the same address, under the same name, and (where applicable) in the same political party.

(f) *State* means a state of the United States and the District of Columbia not exempt from coverage under 42 U.S.C. 1973gg–2(b).

(g) *Closed primary state* means a state that requires party registration as a precondition to vote for partisan races in primary elections or for other nominating procedures.

12. Section 9428.3 of Title 11 of the Code of Federal Regulations provides:

General information.

(a) The national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 9428.4; general instructions for completing the application; and accompanying state-specific instructions.

(b) The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements.

(c) States shall accept, use, and make available the form described in this section.

13. Section 9428.4 of Title 11 of the Code of Federal Regulations provides:

Contents.

(a) *Information about the applicant.* The application shall provide appropriate fields for the applicant's:

(1) Last, first, and middle name, any suffix, and (optional) any prefix;

(2) Address where the applicant lives including:

street number and street name, or rural route with a box number; apartment or unit number; city, town, or village name; state; and zip code; with instructions to draw a locational map if the applicant lives in a rural district or has a non-traditional residence, and directions not to use a post office box or rural route without a box number;

(3) Mailing address if different from the address where the applicant lives, such as a post office box, rural route without a box number, or other street address; city, town, or village name; state; and zip code;

(4) Month, day, and year of birth;

(5) Telephone number (optional); and

(6) Voter identification number as required or requested by the applicant's state of residence for election administration purposes.

(i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine what type of voter identification number, if any, is required or requested by the applicant's state.

(ii) For each state that requires the applicant's full social security number as its voter identification number, the state's Privacy Act notice required at 11 CFR 9428.6(c) shall be reprinted with the instructions for that state.

(7) Political party preference, for an applicant in a closed primary state.

(i) The application shall direct the applicant to

consult the accompanying state-specific instructions to determine if the applicant's state is a closed primary state.

(ii) The accompanying instructions shall state that if the applicant is registering in a state that requires the declaration of party affiliation, then failure to indicate a political party preference, indicating "none", or selecting a party that is not recognized under state law may prevent the applicant from voting in partisan races in primary elections and participating in political party caucuses or conventions, but will not bar an applicant from voting in other elections.

(8) Race/ethnicity, if applicable for the applicant's state of residence. The application shall direct the applicant to consult the state-specific instructions to determine whether race/ethnicity is required or requested by the applicant's state.

(b) *Additional information required by the Act.* (42 U.S.C. 1973gg–7(b)(2) and (4)). The form shall also:

(1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompanying state instructions;

(2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and

belief, meets each of his or her state's specific eligibility requirements;

(3) Provide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature;

(4) Inform an applicant on the application of the penalties provided by law for submitting a false voter registration application;

(5) Provide a field on the application for the name, address, and (optional) telephone number of the person who assisted the applicant in completing the form if the applicant is unable to sign the application without assistance;

(6) State that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(7) State that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

(c) *Other information.* The form will, if appropriate, require an applicant's former address or former name or request a drawing of the area where the applicant lives in relation to local landmarks.

14. Section 9428.5 of Title 11 of the Code of Federal Regulations provides:

Format.

(a) The application shall conform to the technical specifications described in the Commission's National Mail Voter Registration Form Technical Specifications.

(b) *Size.* The application shall consist of a 5" by 8" application card of sufficient stock and weight to satisfy postal regulations. The application card shall be attached by a perforated fold to another 5" by 8" card that contains space for the information set forth at 11 CFR 9428.4(c).

(c) *Layout.* (1) The application shall be sealable.

(2) The outside of the application shall contain an appropriate number of address lines to be completed by the applicant using the state information provided.

(3) Both sides of the application card shall contain space designated "For Official Use Only."

(d) *Color.* The application shall be of ink and paper colors of sufficient contrast to permit for optical scanning capabilities.

(e) *Signature field.* The application shall contain a signature field in lieu of a signature line.

(f) *Type size.* (1) All print on the form shall be of the largest practicable type size.

(2) The requirements on the form specified in 11 CFR 9428.4(b)(1), (6), and (7) shall be in print identical to that used in the attestation portion of the application required by 11 CFR 9428.4(b)(2).

15. Section 9428.6 of Title 11 of the Code of Federal Regulations provides:

Chief state election official.

(a) Each chief state election official shall certify to the Commission within 30 days after July 25, 1994:

(1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including but not limited to the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is a closed primary state.

(2) Any voter identification number that the state requires or requests; and

(3) Whether the state requires or requests a declaration of race/ethnicity;

(4) The state's deadline for accepting voter registration applications; and

(5) The state election office address where the application shall be mailed.

(b) If a state, in accordance with 11 CFR 9428.4(a)(2), requires the applicant's full social security

number, the chief state election official shall provide the Commission with the text of the state's privacy statement required under the Privacy Act of 1974 (5 U.S.C. 552a note).

(c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section.

16. Section 16-166 of the Arizona Revised Statutes provides:

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears in the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by § 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the elector's registration status shall be changed from active to inactive.

B. If the elector provides the county recorder with a new registration form, the county recorder shall change the general register to reflect the changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form to the county recorder of the county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify regis-

trants whose addresses may have changed. If it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration information. If the registrant fails to return the form postmarked not later than thirty-five days after the mailing of the notice, the elector's registration status shall be changed from active to inactive. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October

1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

G. Notwithstanding subsection F of this section, any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship unless the person is changing voter registration from one county to another.

H. For the purposes of this section, proof of voter registration from another state or county is not satisfactory evidence of citizenship.

I. A person who modifies voter registration records with a new residence ballot shall not be required to submit evidence of citizenship. After citizenship has been demonstrated to the county recorder, the person is not required to resubmit satisfactory evidence of citizenship in that county.

J. After a person has submitted satisfactory evidence of citizenship, the county recorder shall indicate this information in the person's permanent voter file. After two years the county recorder may destroy all documents that were submitted as evidence of citizenship.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,
Petitioners,
v.
THE INTER TRIBAL COUNCIL OF ARIZONA, INC., ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA, GEORGIA, KANSAS, MICHIGAN, OKLAHOMA, AND TEXAS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Did the court of appeals err (1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and (2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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INTEREST OF AMICI CURIAE AND INTRODUCTION

The *amici curiae* are States that have the constitutionally recognized authority to regulate the registration and qualification of voters. *See, e.g.*, U.S. Const. art. I, §§ 2 & 4. That power is inherent in the nature of sovereignty, and it pre-existed the establishment of the federal government. Several of the *amici* have invoked this authority to enact legislation that is materially identical to the state law at issue here. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(*l*) (2011). Others stand to have their own state laws negated by the Election Assistance Commission, a federal commission with the ministerial duty to prepare voter registration forms.

States' control over elections will be diminished in law and in practice if the Ninth Circuit's misapplication of the National Voter Registration Act is not reversed. Arizona's Proposition 200 is a voter-approved referendum that "sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006) (per curiam). The States, of course, "indisputably" have a "compelling interest in preserving the integrity of [their] election process[es]." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Proposition 200 furthers that purpose by directing election officials to "reject any application for [voter] registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(f) (2004).

Proposition 200 works hand in glove with the NVRA. Congress adopted the NVRA for several reasons: to "increase the number of eligible citizens who register to vote," "to protect the integrity of the electoral process," and to "enhance[] the participation of eligible citizens as voters in elections." 42 U.S.C. § 1973gg(b). Given these purposes, it is passing strange that the NVRA and Proposition 200 could be in conflict; Proposition 200 is itself designed to protect the electoral process for the benefit of eligible citizens. The lower courts' decision is particularly ironic because its bottom line—that Arizona cannot enforce a law enacted by a popular referendum—nullifies the actual votes cast by Arizonans in the name of making it easier for Arizonans to register to vote.

The *amici* States disagree with the Ninth Circuit's conclusion that courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns" in the area of elections. *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012) (en banc). Instead, in the States' experience, there are few areas in which preserving the "delicate balance" between State and federal interests is more important. "The States possess a 'broad power'" to regulate federal elections, "which power is matched by state control over the election process for state offices." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Although the effectiveness of Arizona's law "may well be debatable," there is "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*

v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008).

The erroneous judgment below could have been avoided if the Ninth Circuit had properly applied traditional preemption doctrines. The NVRA should be construed consistent with these principles and in a manner that minimizes well-recognized constitutional concerns. This approach would maintain the proper state-federal balance and protect the States' good-faith efforts to conduct free and fair elections.

STATEMENT

A. The Controversial Enactment of the NVRA

States have traditionally regulated the registration of voters and administration of elections with minimal interference by federal law. As this Court explained in *United States v. Gradwell*, 243 U.S. 476 (1917), with the notable exception of 24 years during Reconstruction, "it has been [Congress's] policy to leave such regulations almost entirely to the States, whose representatives Congressmen are." *Id.* at 482. "It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections, and repealed all of [the Reconstruction-era] laws with the exception of a few sections not relevant here." *Id.* at 483-84. It was approximately 100 years from the

repeal of those laws before Congress again entered the field of election administration.

In 1992, Congress passed what became the National Voter Registration Act (NVRA), but it was vetoed by President George H. W. Bush. In his veto statement, the President explained that the Act would intrude on "an area of traditional State authority" by imposing "constitutionally questionable Federal regulation." *See* President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), in 1 PUB. PAPERS 1072 (1992).[1] The President further explained that it is "critical" for States to have authority "to tailor voter registration procedures to unique local circumstances." *Id.* The NVRA could "forc[e] them to implement federally mandated and nationally standardized voter registration procedures," which could "restrict severely" their ability to protect the integrity of their own state elections. *Id.* This restriction would "deny the States their historic freedom to govern their own electoral processes" and "contravene the important principles of federalism on which our country was founded." *Id.* President Bush thus determined that Congress's power to enact the bill was "suspect" and presented a "serious constitutional question." *Id.*

The next year, Congress again passed the NVRA, and newly inaugurated President Clinton signed it into law. *See* 42 U.S.C. § 1973gg. Several States—

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[1] *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=4533&year=1992&month=7.

including California, Illinois, Michigan, Mississippi, Pennsylvania, New York, South Carolina, Vermont, and Virginia—refused to implement the NVRA on the grounds of its asserted unconstitutionality. These disputes never reached this Court on the merits.[2]

B. Mechanics of the NVRA

Of particular import to this case, the NVRA prescribes three methods for registering voters for federal elections. 42 U.S.C. § 1973gg–2(a). These methods are: (1) "by application made simultaneously with an application for a motor vehicle driver's license," (2) "by mail application," and (3) "by application in person." *Id.* States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law." *Id.*

Congress established the Election Assistance Commission ("EAC") to develop and promulgate a federal form for use in registering voters by mail.[3]

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[2] *See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995), *cert. denied*, *Wilson v. Voting Rights Coal.*, 116 S. Ct. 815 (1996); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794-96 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946, 964-67 (D.S.C. 1995). *See generally* Cases Raising Claims Under the National Voter Registration Act, U.S. Dept. of Justice, http://www.justice.gov/crt/about/vot/litigation/caselist.php#nvra_cases (last visited Dec. 7, 2012).

[3] The responsibilities of the EAC were formerly held by the Federal Election Commission. The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107–252, 116 Stat. 1666, created the

See 42 U.S.C. § 15321 *et seq.* (establishing the EAC). The NVRA directs the EAC to develop the federal form "in consultation with the chief election officers of the States." *Id.* § 1973gg–7(a)(2). The form must "enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg–7(b)(1). One of the express eligibility criteria that must be included on the form is a question about United States citizenship. *Id.* § 1973gg–7(b)(2).

When a State passes a voting law that changes its processing requirements, it can ask the EAC to include that requirement in the state-specific instructions the EAC provides with the federal form. *See id.* § 1973gg–7(a). For example, as of August 7, 2012, Maine had a request pending to change the registration deadline on the form to comply with a change in Maine law. *See* Letter from Julie L. Flynn, Deputy Secretary of State, to Election Assistance Commission (Aug. 1, 2012) (on file with the Alabama Attorney General's Office). In accordance with the NVRA's command that the form "specif[y] each eligibility requirement," 42 U.S.C. § 1973gg–7, the EAC has generally made the requested changes without controversy. *See* National Mail Voter Registration Form, State Instructions.[4]

The state-specific instructions provided with the federal form almost always require that the registrant provide specific identifying information on

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EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532.

[4] *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited Dec. 13, 2012).

the form. For example, to register in California, "you must provide your California driver's license or California identification card number." *Id.* "Michigan law requires that the same address be used for voter registration and driver license purposes." *Id.* Seven States require a registrant to supply his full Social Security Number. *Id.* Twenty-two States require registrants to indicate a "Choice of Party" in order to participate in the State's primary or caucus. *Id.* Registrants must also review their States' specific voter-registration qualifications and "swear/affirm that: I am a United States citizen, I meet the eligibility requirements of my state and subscribe to any oath required." *Id.* at Voter Registration Application ¶ 9. The form contemplates and has always included state-specific eligibility criteria.

C. Proposition 200

Arizonans voted to approve Proposition 200 by popular referendum. After its passage, the Attorney General of Arizona requested preclearance of the law from the Department of Justice ("DOJ") under Section Five of the Voting Rights Act. And the Secretary of State of Arizona requested that the EAC modify Arizona's state-specific instructions to require registrants to provide proof of citizenship with the federal form. DOJ precleared the law, *see* Pet. Br. 17, but the EAC took the extraordinary step of rejecting Arizona's request to include the law in the state-

specific instructions, *see* Letter from Thomas Wilkins to Arizona Secretary of State (Mar. 6, 2006).[5]

Arizona nevertheless enforced Proposition 200, and several private plaintiffs sued the State to invalidate the law on preemption and other grounds. The trial court below denied a temporary restraining order and concluded that the NVRA did *not* preempt Proposition 200. The Ninth Circuit affirmed the trial court's decision on the issue of preemption. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (*Gonzalez I*).

Arizona returned to the EAC, which held a new vote on Arizona's request to add Proposition 200 to its state-specific instructions on the federal form. *See* Certification, In the Matter of Arizona Request for Accommodation, Before the Election Assistance Commission (July 31, 2006).[6] That vote was a 2-2 tie, and resulted in another denial. *Id.* The EAC Chairman and Vice Chairman both published explanations for voting, respectively, to approve and reject the request. Chairman Paul DeGregorio supported the change by arguing that "leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a

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[5] *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf (last visited Dec. 13, 2012).

[6] *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF (last visited Dec. 13, 2012).

ballot." Statement of EAC Chairman Paul DeGregorio Regarding the EAC's Tally Vote of July 6, 2006, at 2.[7] He also opined that "[f]urther clarification of the federal government's role in developing the National Registration Form is needed to prevent future confusion." *Id.* On the other hand, Vice Chairman Ray Martinez voted against adding to the instructions because "reversing [the EAC's] current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III (July 10, 2006), at 3.[8]

The issue of preemption continued to be litigated on the merits and eventually reached the Ninth Circuit again. *See Gonzalez v. Arizona*, 624 F.3d 1162, 1207 (9th Cir. 2010) (*Gonzalez II*). The *en banc* Ninth Circuit held in a divided opinion that the NVRA preempts Proposition 200 as applied in the federal form. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (*Gonzalez III*).

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[7] *available at* http://www.eac.gov/assets/1/Page/Chairman%20Paul%20DeGregorio%20Regarding%20Arizona%20and%20the%20Federal%20Voter%20Registration%20Form%20August%208%202006.pdf (last visited Dec. 13, 2012).

[8] *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf (last visited Dec. 13, 2012).

SUMMARY OF ARGUMENT

I. Traditional preemption doctrines—such as the presumption against preemption and plain-statement rule—are a practical shorthand for Congressional intent, and they serve that useful function here just as well as they do in other contexts.

In the elections context, preemption is fraught with serious consequences for the state-federal relationship because Congress can commandeer the States' officers to conduct federal elections according to federal law. Moreover, although Congress does not have the power to regulate state and local elections, federal preemption has that practical effect. At a minimum, States are forced to choose between (1) the expense of conducting elections for state and local officers separate from elections for federal officers or (2) adopting federal standards as their own. Often, however, States do not even have that choice. Instead, as in the cases of Mississippi and Illinois, lower courts (perhaps erroneously) prevent States from separately registering voters for state elections. Congress should be presumed not to intend such effects.

The federalism stakes are particularly high in this case. The lower court's rule grants the power to preempt state election laws to a federal agency. That agency is uniquely unsuited to that task. It currently has no commissioners and the NVRA provides it no statutory mandate or guidance. Several state laws risk preemption if the lower court's rule is adopted by this Court.

II. Serious doubts about the constitutionality of the NVRA also compel this Court to give it a narrow reading.

Several States have argued previously that Congress did not have the power to enact the NVRA because it effectively controls voter qualifications. Although the Elections Clause gives Congress power over the time, place, and manner of federal elections, the Qualifications Clause ensures that the federal electorate is the same as the electorate for the highest chamber of each States' legislature. This Court's leading precedent in this area did not command a majority and provides little guidance.

Several States have also argued that the NVRA violates the Tenth Amendment because it controls how States conduct elections for state and local offices. The States' lawsuits on this subject left this question unresolved. The lower courts generally conceded that certain applications of the NVRA might unconstitutionally intrude on state sovereignty.

This Court has never passed on the merits of the concerns identified in the States' previous lawsuits. These live constitutional issues support a rule that gives the NVRA a limited preemptive application.

ARGUMENT

I. The serious consequences of preemption in the election context support the traditional presumption against it.

It makes pragmatic sense to apply the traditional presumption against preemption and plain-statement rule when interpreting election-related legislation. This Court invokes these rules because they help the Court ascertain the "purpose of Congress" that "is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotation marks omitted). Even where Congress plainly intends to preempt *some* state law, this Court has held that Congress can be presumed not to intend the broadest possible preemption. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (presumption against preemption applies to express preemption clause). Against this backdrop, the Ninth Circuit's refusal to apply traditional preemption doctrines to this case makes no sense; these doctrines are no less useful in discerning the intent of Congress in an election-related case than in a case arising under the Supremacy Clause.

In fact, the pragmatic reasons for the presumption against preemption and plain-statement rule are *especially* compelling in the elections context and the circumstances of this case. Precisely because the Elections Clause may permit Congress to "'conscript state agencies to carry out' federal mandates," the Court should be "concerned

with preserving a 'delicate balance' between [the States and the Federal Government]." *Gonzalez III*, 677 F.3d at 391-92. In this case, preemption means that several States will have to change their own laws to comply with federal law and likely change the way they register voters for state and local elections as well. Going forward, States will have to ask permission from a federal commission to register voters according to their own laws. In short, this is precisely the kind of case in which the presumption against preemption and plain-statement rule are important; Congress should not lightly be presumed to have intended these jarring effects.

A. All election-related preemption compels States to change how they conduct federal, state, and local elections.

Election-related preemption is a much more serious breach of the state-federal balance than police-power preemption. Preemption of state police powers displaces state regulation, but it does not compel States to change how they administer their own programs. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Preemption in the election context has much more serious effects.

1. Election-related preemption commandeers States to change their election practices. Although Congress clearly lacks the power to compel States to run the elections for their own officers in any particular manner, the practical effect of all federal election-related legislation is just that. The reality is that, for every election-related law that Congress

enacts, the States have to modify their own election statutes and practices. They have to do this in one of two ways.

One possibility is for a State to change its practices to enforce federal law as to federal elections, and state law as to state elections. Under the Ninth Circuit's decision, for example, Arizona could create separate state-federal registration regimes to enforce both state and federal law. "[A]n Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials." *Gonzalez III*, 677 F.3d at 449 (Rawlinson, J., concurring in part and dissenting in part). This system of "dual registration" would require Arizona to "track whether . . . residents are registered to vote for federal elections, state elections, or both" and to distinguish between these classes of voters on Election Day. *Id.* Given the concurrence of state and federal elections, moving to a two-tiered election system would itself involve changes in state law and practice, such as preparing separate state and federal ballots and developing election-day procedures to identify federal-only voters.

The only other option is for a State to change (or disregard) its own laws and use federal law for federal, state, and local elections. As the first President Bush's veto message predicted, this is the "choice" that 48 of the 50 States were effectively forced to make immediately after President Clinton signed the NVRA. "[M]aintaining two sets of registration rolls would impose massive administrative and economic burdens" on the States.

Welker v. Clarke, 239 F.3d 596, 599 (3d Cir. 2001). For that reason, "most states [have] elected to adopt . . . a single, unified registration system and electorate." *Id.* Here, Arizona's election officials will be under intense economic pressure to adopt, in practice, the federal form for state and local elections, despite the fact that Arizona's voters directly enacted Proposition 200.

2. Notwithstanding the above, the States often have no choice about whether to use preemptive federal election law for administering elections for their own officers. Even though the Elections Clause gives Congress the authority to control only *federal* elections, lower courts often hold (perhaps erroneously) that other federal laws prevent States from registering voters for their own state-level elections separately from elections for federal officers. *See, e.g.*, *Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966) (per curiam) (invalidating under the Equal Protection Clause a system that treated federal voters differently from those registered for state elections). The stories of Mississippi and Illinois are instructive.

Mississippi has twice tried to use separate two-tiered election systems and has twice been stymied by federal law. Mississippi registered voters separately for municipal elections until 1987. In that year, a federal court found that the separate registration system was confusing and burdensome, and violated Section Two of the Voting Rights Act. *See Operation Push v. Allain*, 674 F. Supp. 1245, 1269 (N.D. Miss. 1987), *aff'd sub nom. Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, after Congress enacted the NVRA, Mississippi tried

to use a different system of registration for federal elections than it did for state elections—in other words, the same kind of system Arizona would need to adopt in order to enforce Proposition 200. But DOJ refused to preclear the change to a two-tiered system under Section Five of the Voting Rights Act. *See Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 481 (D.D.C. 2011) (recounting this history). Mississippi fought that decision all the way to this Court, which held that DOJ had the right to prevent Mississippi from "changing" to a dual registration system even though the change was prompted by the NVRA. *See Young v. Fordice*, 520 U.S. 273 (1997) (requiring preclearance before a change from a single registration system to dual registration). Like Mississippi, Arizona is covered by Section Five. In light of the lower court's holding, if Arizona wants to give effect to the voter-approved Proposition 200, it would have to return to DOJ for permission to change to dual registration, even though DOJ already precleared Proposition 200 in 2005.

Illinois likewise decided to implement the NVRA through a dual registration system, instead of using the NVRA's rules to register voters for state and local elections. *See Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 1995 WL 532120, at *1 (N.D. Ill. 1995) (unpublished). That effort was also short-lived. The Illinois courts held that, "without a defensible distinction between the two electorates, the disparity violates equal protection under the federal constitution" and Illinois constitution. *Orr v. Edgar*, 670 N.E.2d 1243, 1253 (Ill. App. Ct. 1996). The court recognized that complying with the NVRA was a "compelling interest" but held that, by altering

its practices for federal elections only, Illinois did not "employ[] the least restrictive means available in order to comply with NVRA." *Id.* The court enjoined Illinois to "permit[] NVRA registrants to vote in state and local elections," even though those NVRA registrants were not properly registered under Illinois state law. *Id.* at 1254. Precedents like these mean that the States may lose control over their own elections because of federal preemption, even if the States are willing to spend the money to run a dual system.

B. The federalism stakes of preemption are particularly high in this case.

If this Court affirms the Ninth Circuit, the result will have especially grave consequences for the state-federal balance in election administration. The NVRA "authorizes federal intrusion into sensitive areas of state and local policymaking, impos[ing] substantial 'federalism costs'" in the mine run of cases. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (discussing Section Five of the Voting Rights Act). The Ninth Circuit's reading of the NVRA in this case invalidates numerous state-specific registration requirements and gives the EAC unbridled legal authority over state election practices.

1. As Petitioners' brief explains, the Ninth Circuit's decision erroneously gives the EAC "ultimate authority" over state election practices. Pet. Br. 43. The EAC is composed of an equal number of *four* members, no more than two of which can be of the same political party. 42 U.S.C.

§ 15323(a) & (b)(2). To make significant changes, the EAC needs an affirmative vote of three of these four members, which is why Arizona's application to add Proposition 200 to its state-specific instructions was denied by a 2-2 tie. And, to make matters worse, there are currently *no* Commissioners serving on the EAC; all four positions are vacant. *See* Commissioners, U.S. Election Assistance Commission.[9] These limitations make the EAC a uniquely ineffective body to be tasked with deciding which state laws are preempted and which ones can be enforced.

Especially in light of these features, the Ninth Circuit's enlargement of the EAC's power flouts well-founded principles of federalism and separation of powers. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely vested in "a single agency official." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Instead, this Court has "rightly reject[ed]" the notion that a state law is preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. 2492, 2524 (2012) (Alito, J., concurring in part and dissenting in part); *see also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (no judicial deference to administrative agencies on questions of preemption). This tradition is no doubt why the EAC has regularly added state-specific instructions to the federal form,

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[9] *available at* http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Dec. 10, 2012).

without controversy and as a mere ministerial task. *See Gonzalez II*, 624 F.3d at 1207 (Kozinski, J., dissenting) (noting that a variety of state-specific requirements have been incorporated into the federal form).

This kind of anomaly—putting an unmanned ministerial commission in charge of election-law preemption—would be justifiable only if it were compelled by an express textual command. But the text of the NVRA does not purport to grant the EAC discretion to reject *any* state law or guide the exercise of that theoretical discretion. *Cf.* Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote of July 6, 2006, at 2 (asking for clarification). Instead, the NVRA *requires* the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2), and in such a way as to "enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg–7(b)(1). Moreover, when Congress wanted to preclude States from requiring certain registration information, it expressly barred them from doing so. *See, e.g.*, *id.* § 1973gg–7(b)(3) (prohibiting the States from requiring notarization). Thus, "the plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg–7(b)." *Gonzalez III*, 677 F.3d at 445 (Rawlinson, J., concurring in part and dissenting in part). Only by rejecting the usual rules of statutory interpretation was the Ninth Circuit able to find a delegation of preemptive authority to the EAC.

2. The statutory preemption at issue here also threatens to upend legislation in several States. As Judge Kozinski has noted, the Ninth Circuit's "reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona." *Gonzalez II*, 624 F.3d 1162 at 1207 (Kozinski, J., dissenting).

In the years since the Ninth Circuit initially *upheld* Arizona's proof-of-citizenship requirement as *not* preempted by the NVRA, *see Gonzalez I*, 485 F.3d at 1050, state legislatures across the country have considered and enacted similar measures. Four States in three different federal circuits—Georgia, Alabama, Kansas, and Tennessee—have already enacted laws that are materially identical to Proposition 200. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(*l*) (2011); Tenn. Code Ann. § 2-2-141(a) (2011).[10] These laws all require proof of citizenship as part of the registration process. And they all provide, like Proposition 200, that the proof-of-citizenship requirement can be satisfied by providing a driver's license number or a photocopy of one of several enumerated documents. *See* Ga. Stat. Ann. § 21-2-216(g)(2); Ala. Code § 31-13-28(k)-(*l*); Kan. Stat. Ann. § 25-2309(*l*)(1)-(13); Tenn. Code Ann. § 2-2-141(b).

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[10] Georgia's, Alabama's, and Kansas's statutes are almost verbatim replicas of Arizona's law. Tennessee's law is phrased in terms of *removing* the registrant from the voting list instead of *denying* the application. Georgia's law was approved by DOJ under Section Five of the Voting Rights Act in 2011.

Other States also have enacted laws that require applicants to provide proof of their eligibility. For example, as of August 7, 2012, Louisiana has requested that the EAC change its state-specific instructions to require applicants without a driver's license number to submit either a copy of a different photo ID or another document that proves the applicant's name and address. *See* Letter from Tom Schedler, Secretary of State, to Election Assistance Commission (July 16, 2012); *see also* La. Rev. Stat. Ann. § 18:104(A)(16) (2009). Similarly, both Florida and Wisconsin require registrants to affirm that they are not previously convicted felons, *see* Fla. Stat. § 97.041(2)(b) (2008); Wis. Stat. Ann. § 6.33(1) (2011), but the EAC has previously rejected Florida's request to include its felon-voting certification on the federal form. *See* Position Statement of Commissioner Ray Martinez III (July 10, 2006), at 4. Given that the EAC currently has *no* commissioners, it seems unlikely that the EAC will be able to act timely on States' pending requests for changes to their state-specific instructions.

* * *

The Court should be mindful not to "exacerbate" the "federalism costs" of the NVRA by reading it broadly to preempt state laws. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (discussing Section Five of the Voting Rights Act). There is no dispute that the Elections Clause does not give Congress the power to regulate state and local elections. But, in practice, the preemption of state election law often does just that. When Congress intends to "conscript state agencies to carry out

federal election mandates," *Gonzalez III*, 677 F.3d at 391 (internal quotation mark omitted), it is not too great a burden for Congress to make that intention plain. In this case, preemption also means elevating the policy choices of a federal commission above the considered judgment of state voters and legislatures. If Congress had intended to depart from the traditional state-federal balance so markedly, Congress would have made its intent plain on the face of the statute.

II. Principles of constitutional avoidance compel a narrow reading of the NVRA.

There have always been grave doubts about the constitutionality of the NVRA. The first President asked to sign the NVRA vetoed it as a "constitutionally questionable Federal regulation on the States in an area of traditional State authority." *See* President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), in 1 PUB. PAPERS 1072 (1992).[11] Similarly, some of the *amici* States have argued elsewhere that the NVRA is unconstitutional. The President and some of the States identified two potential constitutional problems with the NVRA: (1) whether Congress has the power to enact the NVRA at all and (2) whether certain applications of the NVRA violate the Tenth Amendment. This Court has

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[11] *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=4533&year=1992&month=7.

not resolved these issues on their merits. *See Wilson v. Voting Rights Coal.*, 116 S. Ct. 815 (1996) (denying certiorari).

The *amici* States take no position on the constitutionality of the NVRA in this case. The *amici* States instead contend only that the lingering question of the NVRA's constitutionality compels this Court to give the NVRA a narrow berth. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Whatever one thinks about the constitutionality of the NVRA, there is no doubt that the Ninth Circuit's reading of the statute increases its coercive interference on state governments and expands Congress's power under the Elections Clause.

A. States have argued that the NVRA is not a lawful exercise of Congress's power under the Elections Clause.

The NVRA's first potential constitutional infirmity is that Congress's power under the Elections Clause does not necessarily encompass the power to define the electorate for federal elections. The Elections Clause, of course, gives Congress the power to regulate the "time, place, and manner" of conducting elections for federal office. But a separate clause, the Qualifications Clause, gives States authority to define the electorate for federal offices, absent a specific amendment to the contrary. *Cf., e.g.*, U.S. Const. amend. XIX (women's suffrage).

Specifically, the Qualifications Clause defines the federal electorate as the same voters who are qualified to vote for "the most numerous Branch of

the State Legislature." U.S. Const. art. I § 2, cl. 1; U.S. Const. amend. XVII; *see also* U.S. Const. art. II, § 1, cl. 2 (State control over presidential electors). In other words, the Constitution "adopts as the federal standard the standard which each State has chosen for itself." *Oregon v. Mitchell*, 400 U.S. 112, 288 (1970) (Stewart, J., dissenting in part and concurring in part). The Framers intended this compromise to prevent both the States and Congress from gaming the definition of the electorate for federal elections. "It must be satisfactory to every State, because it is conformable to the standard already established . . . . It will be safe to the United States, because it is not alterable by the State governments . . . ." The Federalist No. 52 (James Madison) (J. Cooke ed., 1961).

This Court's precedents on the relationship between the Elections Clause and Qualifications Clause provide little guidance on whether Congress has the power to define the electorate in federal elections. In the leading case on the subject, *Oregon v. Mitchell*, four Justices voted to uphold the power of Congress under the Fourteenth Amendment to set age 18 as a universal minimum voting age, while four voted against finding that authority. But "all eight of those Justices" concluded "that the Constitution requires the same qualifications for state and federal elections." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 233 (1986) (Stevens, J., dissenting). Only Justice Black read the Elections Clause to give Congress the authority to establish a different age qualification for federal elections than

for state elections.[12] The real-world effect of *Oregon v. Mitchell* was quickly mooted by the Twenty-Sixth Amendment, which set the uniform age of 18 for both state and federal elections. U.S. Const. amend. XXVI.[13]

This Court has never directly addressed whether "the manner" of an election includes the subject of voter registration or whether registration is more akin to "qualification." But "[i]t is difficult to see how words could be clearer in stating what Congress can control and what it cannot control." *Oregon*, 400 U.S.

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[12] The U.S. Solicitor General actually conceded the point that Justice Black resolved in the United States' favor. The Solicitor General told the Court at oral argument in *Mitchell* that "the executive branch did not support the validity of [the section of the statute] on any constitutional basis." Richard S. Greene, *Congressional Power over the Elective Franchise: The Unconstitutional Phrases of* Oregon v. Mitchell, 52 B.U. L. Rev. 505, 565 (1972).

[13] Although *Oregon v. Mitchell* produced no majority opinion or precedential constitutional principle, its judgment essentially coerced Congress and the States into amending the Constitution. It left 47 States "with a choice to make before the 1972 presidential election: they could either lower the voting age to eighteen for all elections, or they would have to implement a dual voting system with different ages for federal and state elections." Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1193-94 (2012). Dual systems would have "cost at least $10 million to $20 million throughout the country" and "roughly half of the states would be unable to change their minimum voting ages before the 1972 election because their voting ages were fixed by state constitution." *Id.* at 1194. Ironically enough, amending the Federal Constitution—hardly an easy task—was, in this peculiar circumstance, the easiest way out.

at 210 (Harlan, J., dissenting in part and concurring in part). Lower courts have generally avoided this issue when addressing States' constitutional challenges to the NVRA. *E.g., Ass'n of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794-95 (7th Cir. 1995) (conceding that the NVRA may be unconstitutional if it "ma[d]e it impossible for the state to enforce its voter qualifications"). In light of the uncertain legacy of *Oregon v. Mitchell*, the constitutionality of the NVRA is an open question and cautions against reading the NVRA broadly to preempt state law.

B. States have argued that the NVRA is unconstitutional under the Tenth Amendment.

The second potential constitutional infirmity in the NVRA is that it may unconstitutionally interfere with States' reserved power under the Tenth Amendment. *See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836-37 (6th Cir. 1997) (describing Michigan's Tenth Amendment claims against the NVRA). Specifically, States have argued that the NVRA "conscripts state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment." *Id.* at 836. The NVRA was so coercive, the States alleged, that it had the intent and effect of controlling the manner in which the States conducted state and local elections as well as federal elections. *See id.* at 837. In other words, the cost of running a two-tiered system was "economic

dragooning that [left] the States with no real option but to acquiesce in" using the NVRA's standards for their state and local elections. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012).

The lower courts rejected these Tenth Amendment challenges, but this Court never reviewed them on the merits. There were also important limitations on the lower courts' reasoning. Michigan's Tenth Amendment challenge was rejected because the Sixth Circuit concluded that "[n]othing in the Act prohibits a state from adopting separate registration requirements for the election of state officials," even if it would be financially difficult to do so. *Miller*, 129 F.3d at 837. As explained above, however, courts have invoked other federal laws to enjoin separate registration systems. Likewise, the Ninth Circuit panel that rejected California's Tenth Amendment challenge to the NVRA held only that the Act was not *facially* unconstitutional. *See Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415-16 (9th Cir. 1995). The court expressly "fores[aw] the possibility" that "a certain implementation of the statute sought by the United States, which is helpful but not essential to its interests, [would be] properly resisted by the state on substantial grounds related to its sovereignty." *Id.*

To be clear, the *amici* States are not arguing in this particular forum that the NVRA is unconstitutional; neither the facial nor as-applied constitutionality of the NVRA is directly at issue in this case. Instead, the States believe that the unresolved challenges to the NVRA's constitutionality should inform this Court's judgment about how broadly the NVRA preempts

state law. The NVRA's effects on the States' ability to conduct elections may well "flout the Constitution's express commitment of the task to the States." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring). At the very least, the Ninth Circuit's ruling exacerbates the NVRA's potential constitutional infirmities; this Court should adopt a reading of the NVRA that minimizes them.

* * *

The *amici* States respectfully request that this Court apply traditional principles of preemption and hold that the NVRA does not preempt Proposition 200. That each State can experiment with its own policy choices is "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And the "[d]enial of [the States'] right to experiment may be fraught with serious consequences to the nation." *Id.* This Court can safely presume that Congress does not intend to stay state experimentation through preemption, especially when the experiment concerns the best way to administer free and fair elections.

For its part, the NVRA recognizes that each State will have its own ideas about how best to "assess the eligibility of" potential voters. 42 U.S.C. § 1973gg–7(b)(1). And it requires the EAC to listen to those ideas and incorporate them into the federal registration form that States must "accept and use." *Id.* § 1973gg–4(a)(1). Proposition 200 is consistent with the purposes of the NVRA and the States' compelling interest in ensuring that only eligible

voters can cast a vote. The Court should reverse the Ninth Circuit and lift the injunction against the enforcement of Proposition 200.

CONCLUSION

The Court should reverse the Ninth Circuit.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

THE INTERTRIBAL COUNCIL OF ARIZONA, INC. *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AND 12 CIVIL RIGHTS LAWYERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson;

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The 12 Civil Rights Lawyers include Christian Adams, Clint Bolick, Sheldon T. Bradshaw, Michael Carvin, Roger Clegg, Chris Coates, Charles J. Cooper, Robert Driscoll, Luis Reyes, Brad Reynolds, Brad Schlozman, Hans von Spakovsky. They are all lawyers who formerly worked in the Civil Rights Division of the Justice Department with extensive experience in the enforcement of federal voting rights laws. They are filing in their personal capacities.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans to vote, and to have their vote validly counted, regardless of political correctness. This case is of interest to the 12 Civil Rights Lawyers because they are concerned to protect the integrity of the election process and the rights of American voters.

STATEMENT OF THE CASE

Congress enacted the National Voter Registration Act ("NVRA") in 1993 to increase voter registration. Pet. App. 1h-42h. Concerned over the "increase in non-citizens registering to vote and actually voting in elections", Arizona voters passed Proposition 200 in 2004, which required prospective voters to provide satisfactory evidence of citizenship to register to vote. A.R.S. Section 16-166(F); Pet. App. 42h-50h. Such evidence may include an Arizona drivers license, Arizona ID card, certificate of naturalization, other

naturalization document, tribal identification number, birth certificate, passport, or other documents. A.R.S. Section 16-166(F).

Several Plaintiffs sued the State to prevent implementation of Proposition 200, alleging, *inter alia*, that the Proposition involved an undue burden on registration preempted by the NVRA. In the case of mail in registrations, that statute requires the states to "accept and use the mail voter registration application form (the Federal Form) prescribed by [the U.S. Elections Assistance Commission (EAC)] for the registration of voters in elections for Federal Office."42 U.S.C. Section 1973gg-4(a)(1).

But the statute also mandates that the form accommodate state specified requirements like Arizona's proof of citizenship for registration. The statute says that the form "may require only such identifying information...and other information...as is necessary to enable the appropriate State election official to assess the *eligibility* of the applicant" 42 U.S.C. Section 1973gg-7(b)(1) (emphasis added), which would include proof of citizenship where the state requires citizenship for eligibility to register. Indeed, the federal statute explicitly references state required proof of citizenship, saying that the Federal Form "shall include statements that specify each eligibility requirement (*including citizenship*)...." *Id.* 1973gg-7(b)(2)(emphasis added).

Pursuant to these statutory mandates, the actual federal form devotes 17 of 25 total pages to state-specific instructions to comply with state-specified requirements. Pet. App. 60c-84c. The EAC's regulations regarding the Federal Form provide that

it include "state-specific" instructions as a mandatory "component" of the Federal Form. 11 C.F.R. Section 9428.3(b). The EAC regulations further provide that "[t]he state-specific instructions shall contain... information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. Section 9428.3(b). The EAC even requires state election officials to report and update it on the State's unique "voter registration and eligibility requirements" so that the EAC can update the "state specific" component of the Federal Form. 11 C.F.R. Section 9428.6.

The Department of Justice precleared Proposition 200 on January 24, 2005. (J.A. 193). That means that the Department found that the citizenship requirement "did 'not have the purpose [or] effect of denying or abridging the right to vote on account of race or color.'" *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006) (quoting 42 U.S.C. Section 1973(c)).

But when Arizona submitted its request to the EAC to include Arizona's evidence of citizenship requirement on the state specific instructions for the Federal Form, the then serving EAC Executive Director made a staff decision to refuse to include it, claiming that it was "preempted by Federal law." (J.A. at 181-182, 186). But that staff decision has never been approved by a vote of the EAC Commissioners. Nevertheless, the EAC never acted to include Arizona's citizenship requirement on the Federal Form, even though federal law provides that "any action" taken by the EAC "may be carried out only with the approval of at least three of its [four

Commissioners]." 42 U.S.C. Section 15328. The EAC's failure to include Arizona's citizenship requirement on the Federal Form is also in violation of the EAC's own regulations noted above, which require the EAC to include it on the Federal Form.

Yet, in accordance with the NVRA, Arizona continues to this day to make available, accept and use the Federal Form for voter registration. (J.A. 190 at 191). But the evidence of citizenship requirement remains in effect as well. If an application is received without the required evidence, the county recorder sends the applicant correspondence indicating the evidence required to show citizenship. (J.A. 251; Arizona Secretary of State's Procedures Manual, at 9-14).

In the courts below, the District Court ruled for Arizona, finding that the burdens on potential registrants of showing citizenship were not excessive, that voter fraud in Arizona was a significant problem, and that the citizenship evidence requirement did not conflict with the NVRA. (Pet. App. 3e, 8c; J.A. 288-94, 95). But the Ninth Circuit reversed, concluding that the NVRA preempts Proposition 200 in regard to federal elections, even though Arizona does comply with the NVRA and uses the Federal Form for voter registration. The Supreme Court granted the Writ of Certiorari on October 15.

SUMMARY OF ARGUMENT

The Constitution explicitly provides for the power of the states in setting the qualifications for voting in

federal as well as state elections. Article I, Section 2, Clause 1; Article II, Section 1, Clause 2; 17th Amendment. See Article I, Section 4, Clause 1.

Consistently with these Constitutional provisions, this Court in *Ex Parte Siebold*, 100 U.S. 371, 384-85 (1879) recognized that the Election Clause provided "concurrent authority of the two sovereigns, State and National, over the same subject matter." This Court consequently ruled in *Siebold* that a state election law is preempted when it conflicts with federal law, and then only "so far as the conflict extends" and "no farther."

The Court explained that such a conflict exists only "if both" the federal and state laws at issue "cannot be performed."

Under these precedents, Arizona's evidence of citizenship requirement to register to vote is clearly not preempted under the NVRA. There is no conflict between the evidence of citizenship requirement of Proposition 200 and the NVRA. Arizona has been complying, and continues to comply, with both to this very day. Arizona continues to accept and use the Federal Form under the NVRA, and to enforce its own evidence of citizenship requirement, at the same time and in the same place. So complying with both is not a physical impossibility.

Moreover, the states have long occupied the field of Election Law, as expressly authorized in the Constitution itself. Rather than a clear and manifest purpose of Congress in the NVRA to supercede the

state role in this field, the NVRA expressly provides for that state role.

Moreover, Arizona's evidence of citizenship requirement carries out rather than frustrates the accomplishment of the full purposes and objectives of Congress. Among those purposes and objectives was protecting the integrity of the electoral process.

In any event, the Voter Qualifications Clauses of the Constitution, found in Article I, Section 2, Clause 1, the 17th Amendment, and Article II, Section 1, Clause 2, expressly provide that voter qualifications for federal elections *shall* be the same as the qualifications the states have set for state offices. The federal government does not even have jurisdiction to change or preempt the state voter qualifications, and these Constitutional provisions leave no scope for the federal government to change or preempt the qualifications for federal offices. So the NVRA cannot preempt Arizona's Proposition 200 in any event.

The Ninth Circuit below erred because it failed to follow the long established precedents on preemption, or the Constitution's language itself. The Ninth Circuit's own fabricated standard for this case flatly contradicts this Court's applicable precedents and the language of the Constitution itself.

Moreover, the applicable Constitutional provisions grant to the states the power to define the qualifications to vote in federal elections. So if the NVRA is read as preempting Arizona's proof of

citizenship requirement, the NVRA is unconstitutional as violating these Constitutional provisions.

Under the canon of constitutional avoidance, courts should interpret laws to avoid conflicts with the Constitution if possible. This is another reason why the NVRA should be read as not preempting Arizona's Proposition 200, requiring satisfactory evidence of citizenship to register to vote.

ARGUMENT

I. UNDER THE CONSTITUTION, AND LONG ESTABLISHED PRECEDENTS, THE NVRA DOES NOT PREEMPT THE EVIDENCE OF CITIZENSHIP REQUIREMENT ESTABLISHED BY PROPOSITION 200.

The Constitution explicitly provides for the power of the states in setting the qualifications for voting in federal as well as state elections. Article I, Section 2, Clause 1 of the Constitution states,

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

This language explicitly states that the qualifications for voting for Representatives in each state *shall* be the same as the state has chosen for electing the

members of the most numerous branch of its own legislature. The Federal government does not even have any authority to change or preempt those requirements.

Similarly, the 17th Amendment states,

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years.... The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language explicitly states that the qualifications for voting for Senators in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The Federal government does not have any authority to change or preempt those requirements either.

Even in regard to Presidential elections, Article II, Section 1, Clause 2 of the Constitution states,

> "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled to in the Congress...."

This provision gives the power to the states as well to determine the qualifications for voting in Presidential elections, as the states have the

Constitutional authority to determine the "manner" of choosing the Presidential Electoral College Electors for each state. That would include the qualifications of voters voting for President in each state, and thereby determining who the Presidential Electors from each state will be. Limiting the vote for President to U.S. citizens would be part of the manner the state has set to choose its Presidential Electors for the Electoral College.

Even the Constitution's Elections Clause, which deals only with the time, place and manner of elections, and not the qualifications of voters, gives the primary role to the states, providing:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. I, Section 4, cl. 1.

Consistently with these Constitutional provisions, this Court in *Ex Parte Siebold*, 100 U.S. 371, 384-85 (1879) recognized that the Election Clause provided "concurrent authority of the two sovereigns, State and National, over the same subject matter." This Court consequently ruled in *Siebold* that a state election law is preempted when it conflicts with federal law, and then only "so far as the conflict extends" *id.* at 384, and "no farther" *id.* at 386.

The Court explained that such a conflict exists only "if both" the federal and state laws at issue "cannot be performed." *Id.* Under that standard, a federal election law "does not derogate from the power of the State to execute its laws at the same time and in the same places...[unless] both cannot be executed at the same time." *Id.* at 395.

The *Siebold* Court added that when interpreting a conflicting federal law under the Election Clause, courts "are bound to presume that Congress has... endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, [or] with the duties of state officers." *Id.* at 393.

This Court applied these principles more recently in *Foster v. Love*, 522 U.S. 67 (1997). At issue in that case was the Louisiana open primary system that allowed conclusive Congressional elections in October while federal law required a uniform Election Day in November for such elections. This Court held that "When Louisiana's statute is applied to select from among Congressional candidates in October, it conflicts with federal law and to that extent is void." *Id.* at 74.

This Court further explained in *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) that

> "[I]n all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] start[s] with the assumption that the historic police powers of the States were not to be

> superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

The Court added in *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) that conflict preemption

> "includes cases where compliance with both federal and state regulations is a physical impossibility and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Under these precedents, Arizona's evidence of citizenship requirement to register to vote is clearly not preempted under the NVRA. There is no conflict between the evidence of citizenship requirement of Proposition 200 and the NVRA. Arizona has been complying, and continues to comply, with both to this very day. Arizona continues to accept and use the Federal Form under the NVRA, and to enforce its own evidence of citizenship requirement, at the same time and in the same place, as discussed above. So complying with both is not a physical impossibility. This is unlike in *Foster*, where the same election obviously could not be held in October and also in November.

Moreover, the states have long occupied the field of Election Law, as expressly authorized in the Constitution itself. Rather than a clear and manifest purpose of Congress in the NVRA to supercede the state role in this field, the NVRA expressly provides for that state role, with 17 of the Federal Form's 25

pages involving state rather than federal requirements, as expressly required by the NVRA.

Indeed, the NVRA expressly contemplates a state evidence of citizenship requirement for voter registration. As discussed above, the NVRA provides that the Federal Form may require "such identifying information...as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. Section 1973gg-7(b)(1). Moreover, the NVRA explicitly states that the Federal Form "shall include statements that specify each eligibility requirement (*including citizenship*). *Id.* 1973gg-7(b)(2)(emphasis added).

In addition, the EAC's own regulations expressly contemplate the state role in the administration of the NVRA and setting the qualifications of voters. 11 C.F.R. Section 9428.3(b) explicitly provides that the Federal Form include "state-specific" instructions as a mandatory "component." 11 C.F.R. Section 9428.3(b) further provides that "[t]he state-specific instructions shall contain...information regarding the state's specific voter eligibility and registration requirements."

Moreover, Arizona's evidence of citizenship requirement carries out rather than frustrates the accomplishment of the full purposes and objectives of Congress. Among those purposes and objectives was protecting the integrity of the electoral process, 42 U.S.C. Section 1973gg(b), which includes ensuring that only eligible voters are registered. 42 U.S.C. Section 1973gg-6(a)(1)(administrators of federal elections must "ensure that any *eligible* applicant is registered

to vote in an election" (emphasis added)). The Arizona evidence of citizenship requirement established by Proposition 200 advances this integrity where only U.S. citizens are eligible to vote, as in Arizona.

This integrity purpose is further evidenced by the NVRA requirement that election administrators conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. 42 U.S.C. Section 1973gg-6(a)(4). *See also Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010)(Under the NVRA, "eligibility is the definitive criterion for registration and list maintenance obligations" and consequently, "States must strive to add eligible voters and to remove ineligible ones.").

Also among the purposes and objectives was to avoid a national NVRA that would displace the role of state officials in voter registration. FEC Guide to Implementing the NVRA ("This bill should not be interpreted in any way to supplant [the] authority [of state officials to] make determinations as to applicants eligibility." House Report, Section 5 at 8).

In addition, federal law makes it a felony for a non-citizen to vote in U.S. elections. 18 U.S.C. 611, 1015(f). So Arizona's Proposition 200 furthers this federal requirement and its purpose as well.

Finally, in any event, the Voter Qualifications Clauses of the Constitution, found in Article I, Section 2, Clause 1, the 17th Amendment, and Article

II, Section 1, Clause 2, expressly provide that voter qualifications for federal elections *shall* be the same as the qualifications the states have set for state offices. The federal government does not even have jurisdiction to change or preempt the state voter qualifications, and these Constitutional provisions leave no scope for the federal government to change or preempt the qualifications for federal offices. So the NVRA cannot preempt Arizona's Proposition 200 in any event.

The Ninth Circuit below erred because it failed to follow these long established precedents, or the Constitution's language itself. Even though Voter Qualifications Clauses of the Constitution grant the states unquestioned power over voter qualifications, and even the Election Clause expressly mandates a central state role in Election law, the Ninth Circuit ruled that state voter qualification and election laws have weaker standing than under the Supremacy Clause. The Ninth Circuit below said that the "Elections Clause operates quite differently from the Supremacy Clause" (Pet. App. 15c), explaining that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns," (Pet. App. 16).

The Ninth Circuit fabricated its own preemption standard under these Constitutional Clauses, holding that a state law is preempted if it does not "operate harmoniously in a single procedural scheme" with a federal law that "addresses the same subject." Pet. App. 20c). But this standard does not give any recognition to the unilateral power the Constitution's

Voter Qualification Clauses grant to the states, or to the *two* sovereigns, federal *and* state, granted jurisdiction over the same subject matter in the Elections Clause. It bows even more to the federal government than the law under the Supremacy Clause, where the federal government is supreme.

This fabricated Ninth Circuit standard flatly contradicts this Court's precedents concerning these Constitutional Clauses discussed above. Moreover, it also contradicts the language of the Constitution itself, with state control in federal elections for Congress in Article I, Section 2, Clause 1 and in the 17th Amendment, and in Presidential elections in Article II, Section 1, Clause 2, and dual sovereignty in the Elections Clause, as discussed above. The Ninth Circuit needs to be reversed and reminded yet again that concerning its rulings, this Court's precedents are Supreme.

Under those precedents, Arizona's Proposition 200 is not preempted by the NVRA, as discussed above. Arizona is following both the NVRA and Proposition 200, and so there is no conflict, and no preemption under the applicable law, as discussed above.

II. IF THE NVRA IS READ AS PREEMPTING ARIZONA'S PROPOSITION 200, THEN IT IS THE NVRA THAT IS UNCONSTITUTIONAL.

As discussed above, the applicable Constitutional provisions grant to the states the power to define

the qualifications to vote in federal elections. Article I, Section 2, Clause 1 states "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Again, this language explicitly states that the qualifications for voting for Representatives in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The federal government has no authority to preempt a state's voter qualifications for its own legislature. So it is the states that determine voter qualifications for federal elections to the House of Representatives under the Constitution.

Similarly, the 17th Amendment states,

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years.... The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language again explicitly states that the qualifications for voting for Senators in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The Federal government does not have any authority to change or preempt those requirements either.

Moreover, even in regard to Presidential elections, Article II, Section 1, Clause 2 of the Constitution states,

> "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled to in the Congress...."

Again, this provision gives the power to the states as well to determine the qualifications for voting in Presidential elections, as discussed above.

As James Madison explained, under these Constitutional provisions, the qualifications for voters in federal elections are those "which may be established by the State itself" and are not even subject to the "occasional regulation of the Congress." *The Federalist No. 52*, at 354 (James Madison) (J. Cooke ed. 1961). Alexander Hamilton added, "[P]rescribing qualifications" for voters in federal elections "forms no part of the power...conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60* at 408-409 (Alexander Hamilton) (emphasis in original).

This Court has consequently recognized that "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). *See also Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45 (1959);

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995); *ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (upholding Congress's power under the Elections Clause to enact the NVRA, but indicating that if the State could show that the NVRA made "it impossible for the state to enforce its voter qualifications...we might have a different case.")(Posner, J.).

So if the NVRA is read as preempting Arizona's proof of citizenship requirement, the NVRA is unconstitutional as violating the above Constitutional provisions granting the states the power to set their own voter qualification requirements.

Under the canon of constitutional avoidance, courts should interpret laws to avoid conflicts with the Constitution if possible. *Clark v. Martinez*, 543 U.S. 371 (2005). As this Court said in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001),

> "It is a cardinal principle of statutory interpretation...that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

This is another reason why the NVRA should be read as not preempting Arizona's Proposition 200, requiring satisfactory evidence of citizenship to register to vote.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Ninth Circuit's decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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PETITIONERS

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioners

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QUESTIONS PRESENTED

Did the court of appeals err:

1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and

2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. United States* ("*Arizona*"), No. 11-182, ___ U.S. ___, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011), *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief), and *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008). AULDF filed amicus briefs in the Ninth Circuit panel and en banc proceedings in this case.

AULDF supports the Petitioners' arguments and agrees with their reasons for requesting reversal of the decision below. AULDF writes separately to discuss "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) ("*Purcell*") (Stevens, J., concurring), and the effect the factual findings of the District Courts here,

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[1] Pursuant to Rule 37.2(b), *amicus* certifies that counsel for State Petitioners have provided the Clerk with blanket consent to file amicus brief, and counsels of record for Petitioners County Recorders, *et al.*, and Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and similar evidence of widespread voter registration fraud elsewhere, should have had on the lower court's analysis.

PRELIMINARY STATEMENT

It is important at the outset to identify clearly what the Ninth Circuit held below:

Despite widespread evidence of voter registration fraud, a federal agency can require a State to "accept and use" a voter registration application whose sole protection against non-citizen registration is a signature on a postcard.[2]

In recent years, "voting rights lawsuits have become part of the landscape,"[3] many involving "voter I.D." or requirements that prospective voters identify themselves.[4] This is a "voter I.D." case, but

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[2] "Once the [U.S. Elections Assistance Commission] determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants and to 'accept and use' it for the registration of voters." *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"), Petition Appendix ("Pet. App.") at 1c, 36c.

[3] Robert Barnes, "In Ohio and elsewhere, battles over state voting laws head to court," *The Washington Post*, (Aug. 5, 2012), A1, available at: http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4.

[4] "The controversy over voting rights is playing out against the backdrop of a growing national debate over the issue." Sari Horowitz, "Eric Holder vows to aggressively challenge voter ID laws," *The Washington Post*, (Jul. 10, 2012), A1, available at: http://www.washingtonpost.com/world/national-security/eric-

looks at a different stage of the voting process from the cases that have attracted substantial media headlines. This appeal deals only with a "voter registration fraud" law. The Ninth Circuit prohibited the use of any identification in voter registration using a federal form except a signature. *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"); Pet. App. 33c.

The other cases often involved challenges to "voter impersonation fraud" laws that require voters to show identification at the polls.[5] Voter impersonation fraud laws were upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), and Arizona's requirement to require voter identification at the polls was upheld in this case. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 6c ("We uphold Proposition 200's requirement that voters show identification at the polling place").

In contrast, this appeal involves voter registration fraud, which can be defined narrowly for this case as a non-citizen registering to vote.[6] The

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holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW_story.html.

[5] "Thirty states presently have laws in place that will require all voters to show ID at the polls this November. That number could rise; a total of thirty-three states have passed voter ID laws." "Voter Identification Requirements," National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (Last updated Oct. 24, 2012).

[6] *See, e.g.*, Glenn Cook, "How Many Noncitizens Are Registered to Vote?" *Las Vegas Review Journal*, (Nov. 4, 2012, 10:19 AM), http://www.lvrj.com/opinion/how-many-noncitizens-are-registered-to-vote-177141441.html.

> Last week, I met with two immigrant noncitizens who are not eligible to vote, but who

distinction is critical because, as this Court recognized the last time this case came before it, the court must resolve, *inter alia*, "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell*, 549 U.S. at 6 (Stevens, J., concurring).

The contention in the voter impersonation cases was that such fraud "simply does not exist."[7] Brief of the Indiana Democratic Party in *Crawford*,

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> nonetheless are active registered voters for Tuesday's election. They said they were signed up by Culinary Local 226.
>
> They speak and understand enough English to get by. But they don't read English especially well. They say the Culinary official who registered them to vote didn't tell them what they were signing and didn't ask whether they were citizens. The immigrants said they trusted that the union official's request was routine, thought nothing of it and went about their work.
>
> Then the election drew closer. Then the Culinary canvassers started seeking them out and ordering them to go vote. One of the immigrants was visited at home by a Culinary representative and said the operative made threats of deportation if no ballot was cast. They didn't understand how, as noncitizens, they could be registered to vote if it's illegal for them to vote in a U.S. election. They didn't understand that, upon being signed up, not only is their registration public record, but the record of whether they've voted is public as well.

[7]This contention is incorrect, as *amicus* AULDF demonstrated in its brief in *Crawford*. *See, e.g.*, Brief of American Unity Legal Defense Fund as *Amicus Curiae* in *Crawford*, No. 07-21, 07-25, at 9-15 (documenting in detail several examples of in-person voter impersonation).

No. 07-21, 07-25, at 44. This Court rejected the "simply does not exist" theory, saying

> It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Crawford, 553 U.S. at 195-96 (footnotes omitted).

Thus, "the prevalence and character of the fraudulent practices" can be shown by examples of past fraud and by recent "occasional" examples. Under *Crawford*'s footnote 12, even a single incident would be sufficient. *Crawford*, 553 U.S. at 195 n. 12, *citing* Le & Nicolosi, "Dead Voted in Governor's Race," *Seattle Post–Intelligencer*, (Jan. 7, 2005, 10:00 PM), p. A1. Recent elections have been decided by only a few votes.[8]

But there are many more than a single example of voter registration fraud. Two dogs have been registered to vote in Bernalillo Country, New

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[8] "The closest election in Minnesota this year was the House District 8B contest between incumbent Rep. Mary Franson, R-Alexandria, and Democratic challenger Bob Cunniff. Franson won by a single vote." Jennifer Brooks, "Votes Miscast in House District 8B Election, *Minneapolis Star-Tribune*, (Nov. 19, 2012, 4:46 PM), www.startribune.com/politics/statelocal/179988481.html.

Mexico in the last five years;[9] a copy of a recent New Mexico voter registration form submitted for a dog named "Buddy Tolbert" is attached to this brief as Appendix A.[10] *Crawford*, for example, noted that the Brennan Center for Justice, a fraud denier, admitted that "much of the [in-person] fraud was actually absentee ballot fraud or voter registration fraud." *Crawford*, 553 U.S. at 195 n. 12.

These are not isolated frauds, but are similar to allegations of fraudulent voter registration incidents nationwide. Some of these allegations are staggering in their magnitude, particularly those involving the now-defunct advocacy group, the Association of Community Organizations for Reform Now ("ACORN").[11] Of 1.3 million voters ACORN

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[9] KOB-TV, "4 On Your Side exposes illegal voting in New Mexico," (Nov. 6, 2012, 9:07 AM), http://www.kob.com/article/stories/S2824713.shtml?cat=500.

[10] KOB-TV, Albuquerque, New Mexico, "Dog Voter Registration Form," http://www.documentcloud.org/documents/502051-dog-voter-registration-form.html (Last visited Dec. 6, 2012).

[11] *See, e.g., Buseffink v. Nevada*, 286 P.3d 599, 601-02 (Nev. 2012) (describing ACORN's "blackjack" incentive program to pay for voter registrations in violation of state law); Eric Shawn, "ACORN Pleads Guilty to Voter Registration Fraud in Nevada," FoxNews.com, (Apr. 6, 2011), www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/; "Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN." Keith Ervin, "Three Plead Guilty in Fake Voter Scheme," *Seattle Times*, (Oct. 30, 2007, 2:02AM), *available at* http://seattletimes.nwsource.com/html/localnews/2003982533_acorn30m.html?syndication=rss. "Federal indictments allege the

claimed to have registered, only 450,000 were actually legitimate new voter registrations. Michael Falcone, "Group's Tally of New Voters Was Vastly Overstated," *The New York Times*, (Oct. 24, 2008), A1, *available at* www.nytimes.com/2008/10/24/us/politics/24acorn.html. ACORN officials admitted that up to 30 percent of the registrations they submitted were "faulty." *Id.*

ACORN worked in Arizona and was an original plaintiff in this case. First Amended Complaint, ¶ 17. ACORN off-shoots are still conducting voter registration drives. *See, e.g.*, Tony Lee, "Watchdog Group Calls on IRS to Investigate Re-Branded TX ACORN Branch," Breitbart.com, (Jul. 20, 2012), http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch.

Indeed, at least one expert, Kansas Secretary of State Kris Kobach, attributes the recent surge in state voter identification laws to widespread concern about ACORN and similar efforts. Ryan J. Reilly, "Kris Kobach credits ACORN Hysteria With GOP-led Voter ID Renaissance," TPM, (Jul. 26, 2012, 6:40 PM), http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris_kobach_credits_acorn_coverage_for_voter_id_push_video.php.

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four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," KMBC-TV, "ACORN Workers Indicted on Alleged Voter Fraud," Kansas City, Missouri, (Nov. 1, 2006, 10:25 AM), *available at:* http://www.kmbc.com/politics/10214492/detail.html.

Nor is there any real question about the existence of voter registration fraud involving non-citizens in particular.[12] Another prominent fraud denier, Prof. Richard Hasen, wrote recently: "Unlike impersonation fraud, noncitizen voting cannot be dismissed as a Republican fantasy." Richard Hasen, "A Détente Before the Election," *The New York Times*, (Aug 5, 2012, 9:13 PM), *available at* http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion.

> It was a simple handwritten note left for the Sandoval County [New Mexico] clerk that read, "I would like to have my voter registration card cancelled, please and thank you." The note was short and polite, but it immediately raised red flags about the woman who left it. It didn't take long before election officials learned the reason for the request: The woman was not a United States citizen.

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[12] *See, e.g.*, *Kimani v. Holder*, 695 F.3d 666, 669 (7th Cir. 2012)(statute does not require non-citizen to have voted "knowingly"); *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007) (upholding conviction of a Jamaican citizen who voted in the 2000 Presidential election); *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992)("Simmons lost one vote because one person voted for him who was not a citizen of the United States."); Joe Kimball, "Two non-citizens charged with voter fraud in Austin, Minn.," *MinnPost*, (Dec. 4, 2012), www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn; Dar Danielson, "DCI arrests 3 non-citizens for illegally voting in Pottawattamie County [Iowa]," Radio Iowa, (Sept. 20, 2012), www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/.

> A review of the woman's voting record showed she had cast a ballot in nearly every election since registering as a Republican inside a Motor Vehicle Office in 2005. She is not alone. 4 On Your Side [KOB-TV, Albuquerque, NM] also tracked down a Mexican National who has been voting since 1998, casting his ballot a total of 26 times.

KOB-TV, "4 On Your Side exposes illegal voting in New Mexico," *supra*. Copies of the voter registration forms for these two non-citizens are attached as appendices to this brief. App. 2, 3.

Arizona has a similar record: Even before Arizona became a State, newspapers reported non-citizen voter fraud: "In 1868, the *Arizona Miner* had reported 'hundreds of non-citizens of Mexican origin at Tucson, Tubac, and other places' voting for the same United States congressional candidate 'as many as three times in one day'". Paula Mitchell Marks, AND DIE IN THE WEST, 1996, P. 108.

In the District Court in this case, Chief Judge Silver issued findings of fact including referrals of 159 matters to the Maricopa County Attorney in 2005 "based on evidence that non-citizens had registered to vote." JA 267. Ten non-citizens were charged "for falsely filing voter registration forms claiming they were in fact United States citizens, four of which [*sic*] had voted in an election." *Id.* Exhibits 1108 and 1351 showed that "208 individuals had their voter registrations cancelled after they swore under oath to the Jury Commissioner that they were not citizens, 56 of whom are alleged to have voted in an election." *Id.* Exhibit 1349 showed "five of the nine [persons

prosecuted for illegal voting] were alleged to be non-citizens that had in fact voted . . . Of the five, four pleaded guilty." JA 268. *See also, Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9th Cir. 2007) ("*Gonzalez I*") ("between 1996 and [2006], as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens.").

The New York Times estimated in 2008 that thousands of non-citizens tried to register to vote in Arizona in the prior five years. Ian Urbina, "Voter ID Battle Shifts to Proof of Citizenship," *The New York Times*, (May 12, 2008), www.nytimes.com/2008/05/12/us/politics/12vote.htm.

And a congressional committee reported:

> The [Maricopa] county recorder [Helen Purcell] has received inquiries from people seeking to become U.S. citizens who have been told by Immigration and Customs Enforcement to obtain a letter from her office confirming they have neither registered to vote nor voted. To date, a review of these matters has turned up 37 non-citizens who have registered to vote. Fifteen of these individuals have voted.

Committee on the Judiciary, "The Deceptive Practices and Voter Intimidation Prevention Act of 2007," H. R. Rep. 110-101 (2007), at 12.

Some of the confusion about the existence of voter registration fraud may stem from a belief that, since the non-citizens did not intend to commit fraud, their voter registrations are not fraudulent. As shown by the New Mexico and Nevada examples, *supra*, this evidence of non-citizen voter participation does not necessarily mean that there is

criminal intent.[13] In some cases, the non-citizens are aware that they should not register, but are encouraged or misled by others who should know better:[14]

> On the last day to register to vote this year, Four On Your Side secretly recorded several third party agents to find out how familiar they are with the law. At a Walmart in Albuquerque, two registration agents seemed confused about immigration issues. Our producer told them he was from Canada, but living here legally. "I don't know the immigration stuff," a registrar told him. "You said you're here legally?" Eventually, after re-reading the form, our producer was told he should not register.

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[13] *See, Keathley v. Holder*, 696 F.3d 644 (7th Cir. 2012)(Illinois Dept. of Motor Vehicles official's mistake in registering non-citizen may excuse her violation of voter registration prohibition because she was misled), distinguishing *Kimani*, where the alien attempted subterfuge.

[14] On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake "Voter Identification Cards" to lists which included non-citizens. Julie Foster, "Non-citizens vote with 'Clinton card'?" WorldNet Daily, (Nov. 7, 2000), *available at* www.wnd.com/2000/11/4619/. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton's signature, which read: "Here is your personal Voter Identification Card. Sign your name, then detach your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly." *Id.* A copy of the Clinton letter can be found at: http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg (Last visited Dec. 10, 2012).

KOB-TV, "4 On Your Side exposes illegal voting in New Mexico," *supra*.

The Findings of Fact in this case indicate that voter registration organizations were "misleading non-citizen residents into registering to vote." JA 267, 268. "After talking with this woman, [Yuma County Voter Registration Coordinator Krysty] Marin believes she was a victim of an unscrupulous voter registration organization." JA 268.

A more contentious example of non-citizen voter registration fraud was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities."[15] *Id.*, at 16.

An advocacy group, Hermandad Mexicano Nacional, was alleged to have encouraged illegal voter registration and voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the voter registrations by the advocacy group were illegal. *Id.*, at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id.*, at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, "Contested Contest," *Online Focus*, (Oct. 22, 1997),

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[15] The Committee nevertheless determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez's margin of victory, so the election challenge was dismissed. *Id.*

available at www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html ("And Lopez of Hermandad Mexicana admits his group registered non-citizens."). There was no prosecution.

The context of this case is that voter registration fraud is a known, widespread danger. Whether or not voter impersonation fraud exists, it has not been reported to be as prevalent as voter registration fraud. Courts, following *Crawford*, routinely uphold the use of identification to prevent the less-likely voter impersonation fraud, as did the Ninth Circuit below. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 31c. But, despite the higher likelihood of voter registration fraud, the decision below prevents Arizona from asking for anything more from voter registration applicants using the "Federal Form" than a signature on a postcard. *Gonzalez IV*, 677 F.3d at 398, 400; Pet. App. 32c-33c.

This Court, in a Voting Rights Act pre-clearance decision, seemed to view the statute differently:

> Nonetheless, implementation of the NVRA[16] is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may – or may not – provide or request.

Young v. Fordice, 520 U.S. 273, 286 (1997).

Thus, at a time when advocacy organizations admit that they have submitted hundreds of thousands of "faulty" voter registration applications, the Ninth Circuit suggests that the only protection

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[16] National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg *et seq.*

against fraud a State is permitted to use on a federal form that must be accepted is whether the applicants "attested to being U.S. citizens." *Gonzalez IV*, 677 F.3d at 398-99 (emphasis added); Pet. App. 31c. This willful blindness toward fraud cannot be consistent with the "language and structure" of the NVRA, whose four express purposes include "increas[ing] the number of eligible citizens who register to vote," "enhanc[ing] the participation of eligible citizens as voters," "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4).

SUMMARY OF ARGUMENT

The Petitioners' Opening Briefs describe several reasons for reversal. In the context of the widespread existence of voter registration fraud, as shown above, the lower court should be reversed because it misunderstood the "language and structure" of the NVRA, and it failed to give due regard to the State's important interests in protecting the integrity of its elections.

First, the decision below rewrote the text of the statute, changing the limitation that a State "may require only such identifying information (including the signature of the applicant) and other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," 42 U.S.C. § 1973gg-7(b)(1), to a more restrictive limit that a State "may require only ... the signature of the applicant." This is inconsistent with this Court's

position in *Fordice* that "The NVRA does not list, for example, all the other information the State may – or may not – provide or request." 520 U.S. at 286. By requiring a State to accept only a signature as evidence of citizenship, the court below ignored the statutory language, and failed to realize that its interpretation is unreasonable in light of widespread voter registration fraud.

Second, the court below may have believed, as it indicated, that Congress intended the NVRA only (or principally) to streamline voter registration, but this, too, ignores the statutory language and is unreasonable in current circumstances. The NVRA contains four specific goals: "increas[ing] the number of eligible citizens who register to vote," "enhanc[ing] the participation of eligible citizens as voters," "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4). Each of these four goals recognizes the need to keep non-citizens from registering to vote. There is no indication in the legislative history or in this Court's interpretations, that making voter registration easier trumps those other goals of protecting the integrity of the voter rolls. "In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process." *Crawford*, 553 U.S. at 192 (emphasis added). In light of the evidence of widespread voter registration fraud, the Ninth Circuit's approach not only does not serve the purposes of the NVRA, it actively undermines them, driving "honest citizens out of the democratic process." *Purcell*, 549 U.S. at 4. In other words, by

"streamlining" for a few, the Ninth Circuit undercuts all the others.

Finally, in setting out its new Elections Clause preemption analysis, the Ninth Circuit minimized or ignored important State interests recognized in previous decisions by this and other Courts. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford,* 553 U.S. at 196. Yet, despite this Court's direction in an earlier stage of this case that the lower courts engage in a factual investigation of, *inter alia*, "the prevalence and character of the fraudulent practices", *Purcell*, 549 U.S. at 6, the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court's Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

In this hyper-politicized environment, the lower courts are struggling to determine challenges to voter identification laws.[17] The decision below will

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[17] *See, e.g., Voting Integrity Project v. Andrade*, No. 3:12-cv-00044, (S.D.Texas, August 2, 2012), Opinion And Order Granting In Part And Denying In Part Plaintiffs' Motion For A Preliminary Injunction, Pp. 37-41. "Although it is clear that the Elections Clause grants Congress the power to override state election laws regulating federal elections, case law says little about the proper standard to apply when analyzing Elections

only confuse and mislead the other courts. The Court should assist the lower courts in understanding how to analyze voter registration fraud laws by reversing the decision below.

ARGUMENT

I. THE DECISION BELOW MISUNDERSTANDS THE "LANGUAGE AND STRUCTURE" OF THE NVRA.

The initial question is whether the Ninth Circuit correctly assessed the "language and structure" of the NVRA. *Gonzalez IV*, 677 F.3d at 403 n. 29; Pet. App. 41c. Whether or not, as the Ninth Circuit asserts, there is a difference between Supremacy Clause and Election Clause preemption analyses, the difference is likely not in the controlling nature of Congressional intent. "[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

The Ninth Circuit, in its analysis, deflected this question to an agency's interpretation and "balance" of legislative purposes:

> With respect to the Federal Form, Congress delegated to the EAC the decision of how to balance the need "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and the need to

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Clause preemption." *Id.*, at 38. The lower court there adopted the Ninth Circuit's analysis. *Id.*, at 40.

> protect "the integrity of the electoral process," *id.* § 1973gg(b)(1), (3). The EAC struck this balance by requiring applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship.

Gonzalez IV, 677 F.3d at 403; Pet. App. 42c.

Leaving such a decision to a federal agency means that a decision not to enforce the statute displaces State law in the same way as an affirmative act by Congress, but this conflicts with decisions such as *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008)("agency nonenforcement of a federal statute is not the same as a policy of approval.").[18]

The Court should not ratify an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible

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[18] Such an interpretation also raises questions about implied repeals. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-64 (2007)("repeals by implication are not favored" and will not be presumed unless "the intention of the legislature to repeal [is] clear and manifest." (internal quotation omitted)). If the Elections Clause treats the NVRA as a later enactment by the same "legislature" that passed Arizona's Proposition 200, *Gonzalez IV*, 677 F.3d at 395, Pet. App. 20c, then any repeal that is not express would necessarily be implied. And it likely could not be said that the Arizona provision is a "positive repugnancy" to the federal act, *Home Builders*, 551 U.S. at 664 n. 8, perhaps justifying implied repeal, since it seems to support the statutory purposes of the NVRA. 42 U.S.C. § 1973gg-b(1)-(4).

constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Leaving aside these questions, however, the Ninth Circuit's analysis ignores statutory interpretation principles as described in other decisions.

A. The Ninth Circuit's Analysis Would Rewrite the Text of the NVRA.

The relevant statutory provision says that a State:

> may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

The Ninth Circuit would rewrite that provision to read: "may require only ... the signature of the applicant." This would, in effect, delete the remainder of the sentence so as not to suggest that information other than the signature might be requested.

That revision would be inconsistent with *Fordice*. The Court "recognize[d] that the NVRA imposes certain mandates on States, describing those mandates in detail." 520 U.S. at 286. But the *Fordice* Court disagreed with the Ninth Circuit's

revision of the relevant sentence: "The NVRA does not list, for example, all the other information the State may – or may not – provide or request." *Id.* The original panel in this case similarly analyzed this requirement and determined that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez I,* 485 F.3d at 1050-51. *See also, McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (upholding requirement that voter registration applicants provide valid social security numbers to register). "The NVRA does not specifically forbid use of social security numbers." *Id.*, 226 F.3d at 755.

This Court has recently found that signature verification, at least in ballot initiative circulation, is an inadequate sole safeguard for election integrity: "But the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks "only 3 to 5% of signatures," ...), and the secretary can make mistakes, too." *John Doe No.1 v. Reed*, ___ U.S. ___, 130 S.Ct. 2811, 2820 (2010). In light of the evidence of widespread voter registration fraud found in the record here and in numerous official and media reports elsewhere, as shown above, the Ninth Circuit's position is not only inconsistent with the statute, it is unreasonable.

B. The Ninth Circuit Opinion Recognizes Only One of the Four Purposes of the NVRA.

The Ninth Circuit mentioned in passing that the NVRA has "four articulated purposes," *Gonzalez,* 677 F.3d at 403; Pet. App. 41c, but saw only one as controlling: "Proposition 200's registration provision is discordant with the NVRA's goal of streamlining

the registration process." *Gonzalez IV*, 677 F.3d at 400 (emphasis added); Pet. App. 36c.

The use of the term "goal" (instead of "goals") of the NVRA is revealing. The NVRA was a balance of interests with four enumerated purposes, but the Ninth Circuit ignored three of them.

The Ninth Circuit's "single-purpose" view of the NVRA is inconsistent with the statutory language and has been rejected by this Court. "In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process." *Crawford*, 553 U.S. at 192 (emphasis added). *See, also, Project Vote/Voting for America v. Long*, 682 F.3d 331, 334 (4th Cir. 2012)("Congress enacted the NVRA in order to 'increase the number of eligible citizens who register to vote' in federal elections, 'enhance[ ] the participation of eligible citizens as voters,' 'protect the integrity of the electoral process,' and 'ensure that accurate and current voter registration rolls are maintained.'"); *Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009) ("Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained."); *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 391 (6th Cir. 2008) (NVRA has "dual objectives" of "increas[ing] the number of eligible citizens who register to vote in elections for federal office,' while also assuring that '*accurate and current* voter registration rolls are maintained." Emphasis in original.); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2nd Cir. 2000).

Each of the four statutory purposes of the NVRA includes a reference to eligibility, integrity or accuracy:

- to "increase the number of **eligible citizens** who register to vote";[19]
- to "enhance[] the participation of **eligible citizens** as voters";[20]
- to "**protect the integrity** of the electoral process";[21] and,
- to "ensure that **accurate and current** voter registration rolls are maintained."[22]

None of the highlighted terms fit into a singular "goal" of the NVRA, solely to "streamline" registration. The Second Circuit, for example, rejected an argument that defeat of an amendment by the NVRA conference committee was effective, in the face of statutory text, to show the controlling nature of the purpose of increasing voter registration opportunities. *Disabled in Action*, 202 F.3d at 127. The Ninth Circuit here accepted that argument. *Gonzalez IV*, 677 F.3d at 403, n. 29.

Each statutory purpose is inconsistent with an interpretation which permits only a signature requirement to account for eligibility concerns. Congress was apparently as interested in "protect[ing] the integrity of the electoral process," § 1973gg(b)(3), as in reduc[ing] state-imposed obstacles to federal registration.

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[19] 42 U.S.C. § 1973gg(b)(1) (emphasis added).

[20] 42 U.S.C. § 1973gg(b)(2) (emphasis added).

[21] 42 U.S.C. § 1973gg(b)(3) (emphasis added).

[22] 42 U.S.C. § 1973gg(b)(4) (emphasis added).

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford,* 553 U.S. at 196 (emphases added). The *Crawford* analysis of the state's interests was not confined to the polling places, but seems to encompass the "election process." *Id.*

Protecting the integrity of the electoral process is necessary to the achievement of the other purposes. For example, Congress recognized that the integrity of the electoral process was crucial to "enhanc[ing] the participation of eligible citizens as voters." § 1973gg(b)(2). In an earlier proceeding in this case, the Court agreed with that approach: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell,* 549 U.S. at 4; *see, also, Doe,* ___ U.S. at ___, 130 S.Ct. at 2819 ("The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government'", *citing, Purcell,* 549 U.S. at 4, and *Crawford,* 553 U.S. at 196).

By focusing solely on a singular "goal" of the NVRA, the Ninth Circuit's view does not appear to be supported by either the text of the statute or precedent. Nor is it a reasonable position, since, in light of the evidence of widespread voter registration fraud, the achievement of the Ninth Circuit's sole NVRA "goal" of "streamlining" voter registration

would appear to undercut the four statutory purposes, all of which protect both the voting power of "eligible citizens" and the integrity of the electoral process. In other words, by "streamlining" for a few, the Ninth Circuit undercuts all the others, driving "honest citizens out of the democratic process." The Ninth Circuit's conclusion about Congressional intent is tainted by its failure to accept all four purposes of the statute; it should be reversed.

II. THE NINTH CIRCUIT FAILED TO RECOGNIZE LEGITIMATE STATE INTERESTS IN PROTECTING THE INTEGRITY OF THE ELECTION SYSTEM.

This Court, in *Purcell* and *Crawford*, established standards for reviewing the state interests underlying voter identification laws. The Ninth Circuit, on the other hand, simply announced, as part of its Elections Clause analysis, that "the Elections Clause affects only an area in which the states have no inherent or reserved power." *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

It is true that the Elections Clause looks to the Constitution to find state interests, *id.*, but that does not necessarily mean that the States have no interests to consider. The Ninth Circuit simply ignored the legitimate State interests long recognized by this Court, saying "Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns". *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

The States have long been viewed as having inherent rights to protect against voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford,* 553 U.S. at 196; *see also, Project Vote/Voting for America*, 682 F.3d at 340 ("State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible.").

Similarly, the State has a substantial interest in protecting voter confidence:

> Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Crawford, 553 U.S. at 197.

There are thus three specific state interests at stake, two involving prevention of voter fraud ("counting only the votes of eligible voters" and "orderly administration and accurate

recordkeeping"), and one involving the protection of public confidence in the integrity of the voting process by deterring fraud and "confirm[ing] the identity of voters." *Id.* Each of these three interests is implicated in this case and protected by the Arizona identification requirement.

As shown *supra*, each of the *Crawford* sources of evidence of voter fraud, 553 U.S. at 195, is present here: historical accounts, recent examples, and Arizona's own evidence of fraud significant enough to affect close elections. That evidence shows that Arizona's interest in preventing voter fraud is strong.

Arizona's separate, though related, concern about public confidence in the electoral system is also strong. In *Purcell*, an earlier part of this case, this Court, per curiam, said:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell, 549 U.S. at 4.

Arizona has perhaps one of the strongest indications that the public lacked confidence in the electoral system: Arizona's voters overwhelmingly voted to change the system and replace it with one in which they had more confidence. In response to increasing concerns about the level of voter fraud in Arizona and elsewhere, in 2004, the voters of Arizona adopted Proposition 200. "The measure sought to combat voter fraud by requiring voters to

present proof of citizenship when they register to vote and to present identification when they vote on election day." *Purcell*, 549 U.S. at 2; *see also, ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008)("The resolution submitting this measure to the voters echoes those [fraud] concerns.").

Yet, despite this Court's admonition that the lower courts engage in a factual investigation of, *inter alia*, "the prevalence and character of the fraudulent practices", the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court's Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

At a minimum, such an analysis seems to ignore the interests recognized in *Purcell* and *Crawford*. *See, also, Common Cause/Georgia*, 554 F.3d at 1354-55, *quoting Burdick v. Takushi*, 504 U.S. 428, 440 (1992). "The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than 'sufficient to outweigh the limited burden' of producing [citizenship] identification." *Id.*

These State interests are significant enough to be considered in any review of voter registration procedures, and the Ninth Circuit erred in overlooking or minimizing them. If the Court wishes to preserve these State interests, it should reverse this decision.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Unity Legal Defense Fund respectfully requests this Court to reverse the decision below.

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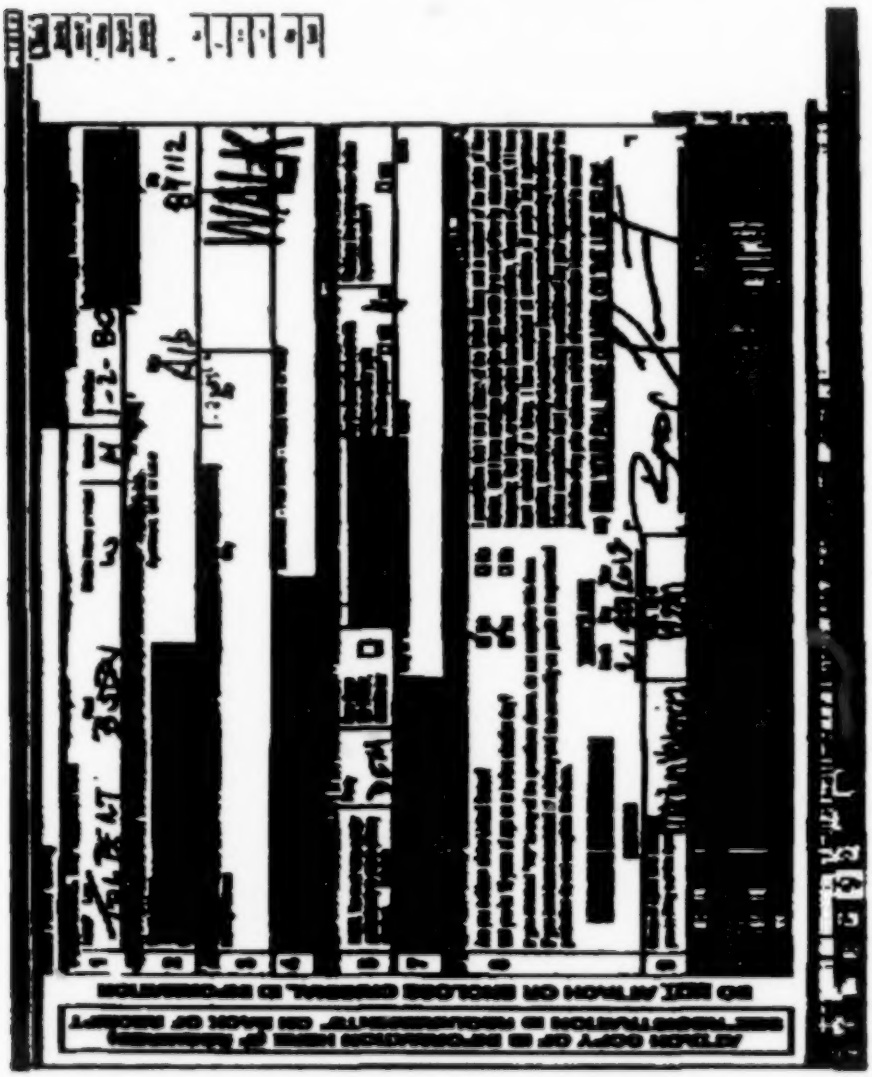
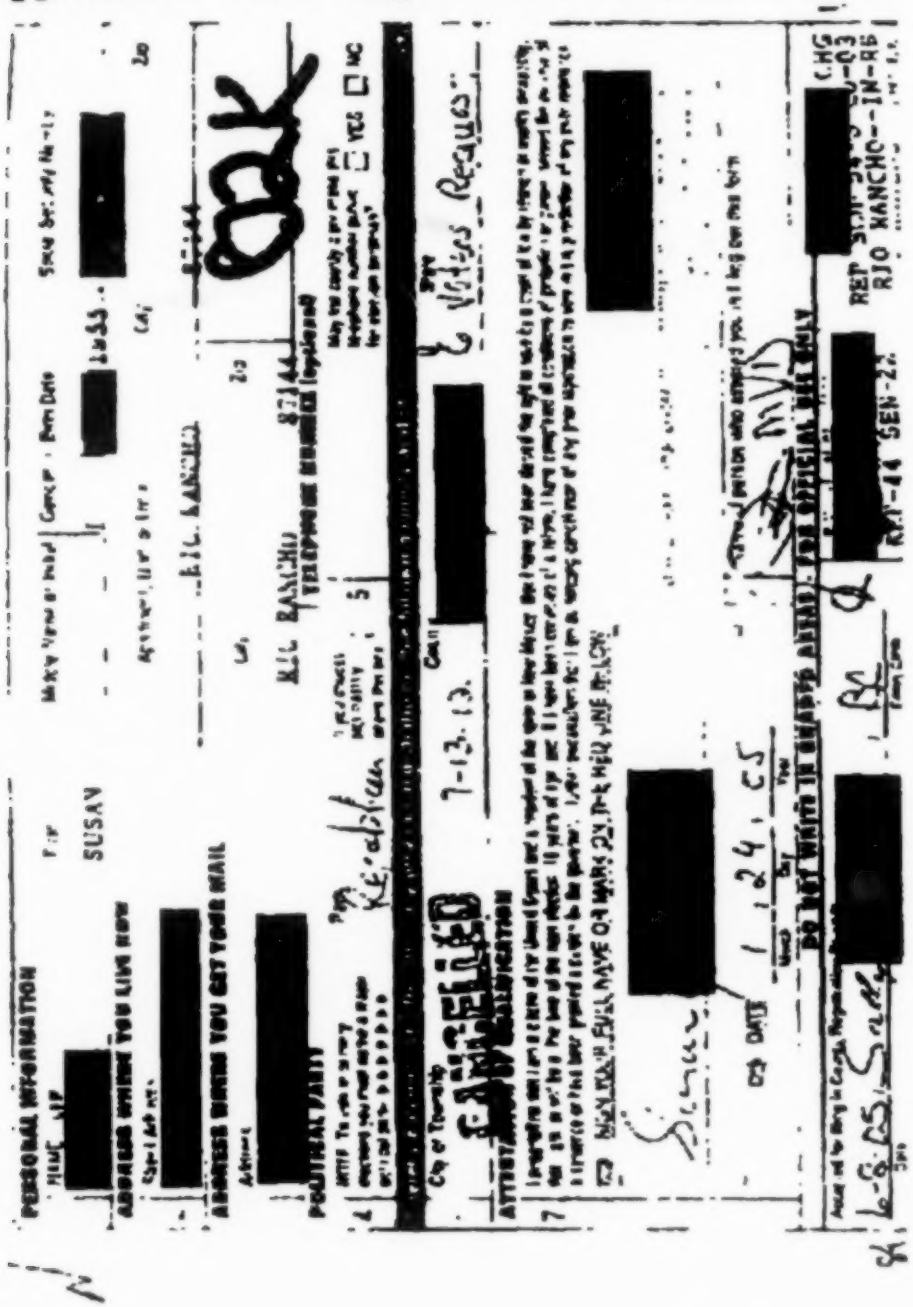
APPENDIX

Appendix A: Voter Registration Card for "Buddy Tolbert," A Dog[23]



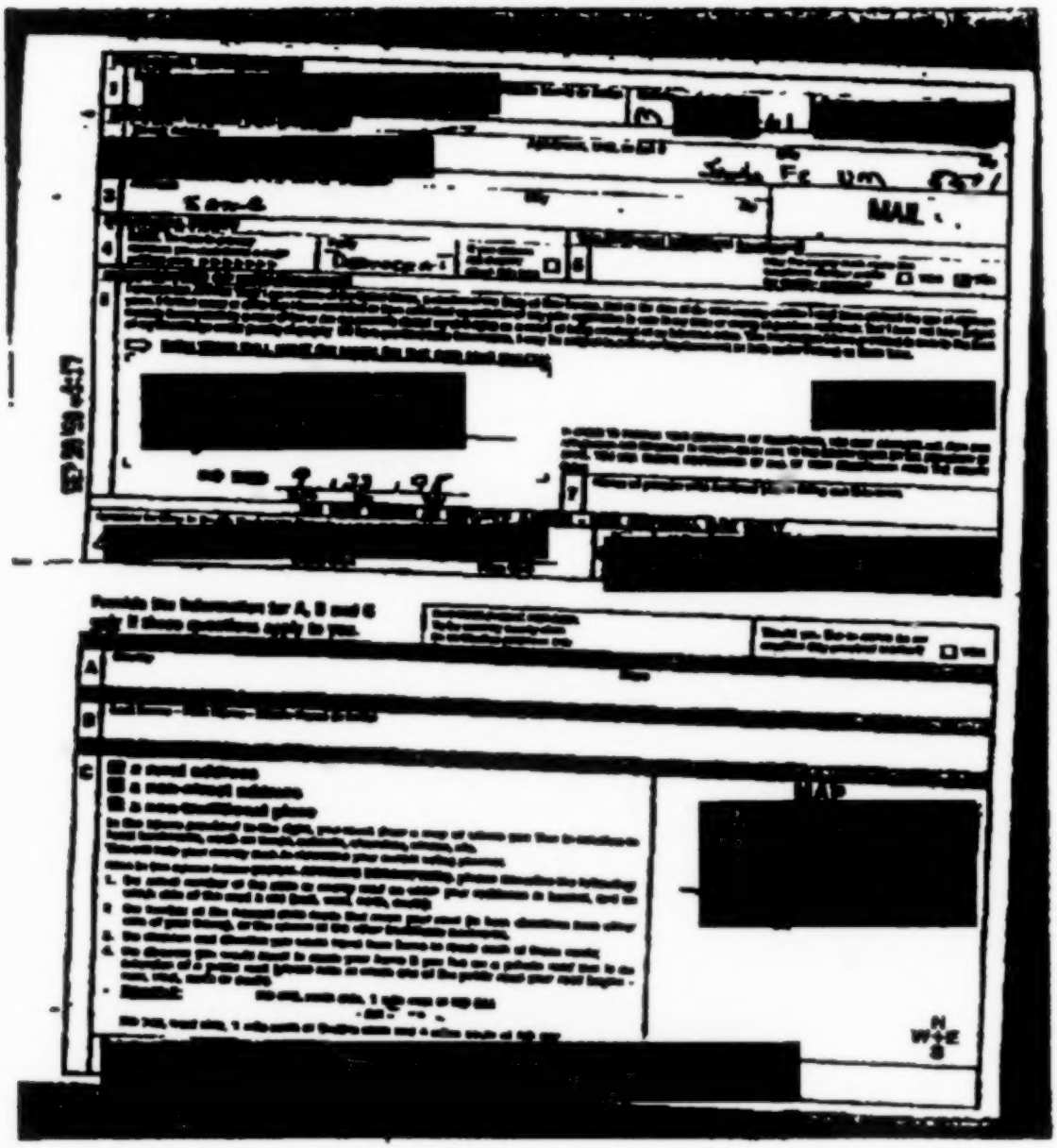
[23] KOB-TV, Albuquerque, New Mexico, "Dog Voter Registration Form," www.documentcloud.org/documents/502051-dog-voter-registration-form.html (Last visited Dec. 6, 2012); *See also.* Dean Pretorius, "Dog Registered to Vote by Thomas Tolbert, New Mexico Man," *Huffington Post*, March 1, 2012, www.huffingtonpost.com/2012/03/01/dog-registered-to-vote-thomas-tolbert_n_1314963.html (last visited Dec. 10, 2012).

Appendix B: Voter Registration Card for "Susan"[24]



[24] KOB-TV, Albuquerque, New Mexico, "Female Non-Citizen Voter Info," http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html (Last visited Dec. 6, 2012).

Appendix C: Voter Registration Card for Male Non-Citizen Resident of Nambe, NM[25]



[25] KOB-TV, Albuquerque, New Mexico, "Male Non-Citizen Voter Info," http://www.documentcloud.org/documents/502053-male-non-citizen-voter-info.html (Last visited Dec. 6, 2012).

AMICUS CURIAE BRIEF

No. 12-71

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ARIZONA, ET AL.,

Petitioners,

—v.—

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF THE RESPONDENTS

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January 22, 2013

(additional *amici* listed on inside cover)

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Additional *Amici*

The following additional *amici curiae* consist of Asian American organizations in states that have proof-of-citizenship laws similar to Arizona's or whose state legislatures are considering such laws, and have conducted voter registration drives.

Alliance of South Asian American Labor
Asian and Pacific Islander American Vote – Michigan
Center for Pan Asian Community Services, Inc.
Chhaya Community Development Corporation
Chinese Community Federation of Atlanta
Coalition of Asian Pacific Americans of Virginia
Korean American Civic Empowerment
Korean Americans for Political Advancement
MinKwon Center for Community Action
Organization of Chinese Americans – Georgia
Organization of Chinese Americans – Greater Houston
Taking Our Seat

QUESTION PRESENTED

Whether the Ninth Circuit, sitting *en banc*, correctly held that the NVRA's "accept and use" mandate preempts an Arizona law requiring that its local elections officials reject the Congressionally mandated Federal Form to the extent that the applicant does not provide state-required documentation, even where the applicant satisfies the Federal Form's requirements.

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INTEREST OF *AMICI CURIAE*[1]

The Asian American Legal Defense and Education Fund ("AALDEF") is a national civil-rights organization based in New York, New York. AALDEF promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. A significant component of AALDEF's mission is to ensure that Asian Americans have an equal opportunity to participate in the voting process. To that end, AALDEF advocates on behalf of Asian American voters and conducts voter registration drives, voter education events and voter protection activities.

The Asian American *Amici*[2] submit this brief in support of Respondents for two reasons: (i) to help ensure that Asian American citizens, both native-born and naturalized, enjoy the same access to the polls as all other citizens; and (ii) to draw this Court's attention to the hurdles Asian American and other minority voters will encounter as a result of Proposition 200—hurdles that conflict with the stated purpose of the National Voter Registration Act (the "NVRA"), 42 U.S.C. § 1973gg, *et seq.*[3]

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1 No party to this litigation, nor its counsel, either authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. Also, no person—other than the *amici*, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Additionally, there is no parent or publicly held company owning 10% or more of the *amici*'s stock.

2 The "Asian American *Amici*" include AALDEF and other organizations that represent Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on Election Day listed in the Appendix.

3 All parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

The Asian American *Amici* incorporate by reference the preemption arguments stated in the Brief of Respondents The Inter Tribal Council of Arizona, Inc. that Arizona's Proposition 200 is preempted by the NVRA and respectfully refer the Court to the Respondents' brief.

We write to demonstrate to the Court that Proposition 200 is void because it creates unnecessary and discriminatory barriers to the fundamental right to vote, specifically for the Asian American community.

In 1993, Congress enacted the NVRA, which was designed, among other things, to eliminate "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups including racial minorities." 42 U.S.C. § 1973gg(a)(3). To that end, Congress charged the Election Assistance Commission (the "EAC") with developing a federal voter-registration form for federal elections (the "Federal Form"), which would (i) specify voter eligibility requirements, including citizenship; and (ii) require the signature of the applicant under penalty of perjury. *See id.* § 1973gg-7. The NVRA further required that "[e]ach State . . . accept and use" the Federal Form. *Id.* § 1973gg-4(a)(1).

In 2004, despite the NVRA's "accept and use" requirement, Arizona enacted Proposition 200, which mandates that its local elections officials reject new voter applications unless applicants provide documentary proof of citizenship in addition to

completing the Federal Form. *See* Ariz. Rev. Stat. §§ 16-152, 16-166, 16-579 (LexisNexis 2011). According to its "findings and declaration" section, Proposition 200 was enacted to "declare that the public interest of [Arizona] requires all public agencies within [Arizona] to cooperate with federal immigration authorities to discourage illegal immigration," presumably to maintain the integrity of voting in Arizona. Instead, Proposition 200 greatly diminishes the integrity of the voting process by erecting barriers to voting for naturalized citizens, many of whom are minorities.

In practice, the Arizona initiative makes it more difficult for naturalized citizens to register to vote. Proposition 200's call for "satisfactory evidence" of citizenship is a particularly high hurdle for the Asian American citizens of Arizona, approximately 40% of whom are naturalized. *See id.* § 16-166(F). For example, under Proposition 200, although native-born citizens may simply mail copies of their U.S. birth certificates with their voter registration applications to register to vote, naturalized citizens must physically bring their original naturalization certificate, in person, to the voter registrar in Arizona. Additionally, a Naturalization Number (defined below), one of the forms of additional documentary proof of citizenship permitted under Proposition 200, cannot be verified with United States Citizenship and Immigration Services ("USCIS"), thus completely precluding that form of proof of citizenship. Instead of increasing the integrity of the voting process in Arizona, Proposition 200 limits voting access for actual citizens living in Arizona.

SUMMARY OF THE CASE

The NVRA's Registration Provisions

Congress enacted the NVRA to establish, among other things, "procedures that [would] increase the number of eligible citizens who register to vote in elections for Federal office" and "to protect the integrity of the electoral process." *See* 42 U.S.C. § 1973gg(b). The NVRA states that "the right of citizens of the United States to vote is a fundamental right," and "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups including racial minorities." *See id.* § 1973gg(a).

Section 4 of the NVRA requires that States accept and use the Federal Form. *Id.* § 1973gg-4(a)(1). The NVRA also dictates the contents of the Federal Form, which in pertinent part:

> (2) shall include a statement that—
>
> > (A) specifies each eligibility requirement (including citizenship);
> >
> > (B) contains an attestation that the applicant meets each such requirement; and
> >
> > (C) requires the signature of the applicant, under penalty of perjury;
>
> (3) may not include any requirement for notarization or other formal authentication
>
> . . . .

Id. § 1973gg-7(b).

Proposition 200

Proposition 200 requires that the county recorder reject any voter registration application if the applicant has not provided "satisfactory evidence of citizenship." *See* Ariz. Rev. Stat. § 16-166(F) ("The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship."). Satisfactory evidence of citizenship may be established by providing one of the following:

- The number of the applicant's Arizona driver's license or state identification card, if the card is issued after October 1996, or the number of a license or an identification card from another State if the card states that the holder has provided satisfactory evidence of U.S. citizenship;
- A copy of the applicant's U.S. birth certificate;
- A copy of the applicant's U.S. Passport;
- A presentation to the county recorder of the applicant's U.S. naturalization documents;
- The number of the applicant's certificate of naturalization (the "Naturalization Number");
- Other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986; or

- The applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Id. §§ 16-152, 16-166. Notably, if the applicant provides his or her Naturalization Number, the applicant will not be included in registration rolls until the Naturalization Number is verified with the United States Immigration and Naturalization Service[1] by the county recorder. Such number cannot be verified with the federal government, however. Any application that furnishes only the Naturalization Number would be automatically rejected for that reason.

Asian Americans in Arizona

In Arizona, Asian Americans make up approximately 3% of the population, but approximately 21.3% of foreign-born naturalized citizens. Of the estimated 194,475 Asian Americans living in Arizona, approximately 35.9% are foreign-born naturalized citizens. White Americans make up 79.3% of the population and only 5.05% of White Americans are foreign-born naturalized citizens. *See* U.S. Census Bureau, American FactFinder; 2011 American Community Survey, 1-Year Estimates S0501, Selected Characteristics of the Native and Foreign-Born Populations, Arizona, 2011 (the "U.S. Census Native and Foreign-Born Populations Data"). Given these statistics, Asian Americans are at a disproportionate risk of disenfranchisement through the implementation of Proposition 200. This Court's

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[1] The United States Immigration and Naturalization Service is now known as the USCIS.

determination will have major implications on new Asian American citizens wishing to exercise their right to participate in the electoral process.

Similar Proof-of-Citizenship Laws in Other Jurisdictions

The Court's determination could potentially impact new Asian American citizens far beyond Arizona's borders. Four states—Georgia, Alabama, Tennessee and Kansas—have passed similar proof-of-citizenship laws.[5] Notably, Georgia's proof-of-citizenship law, SB 86, closely mirrors Proposition 200 and has resulted in serious barriers to Asian Americans seeking to register to vote in Georgia. For example, as of October 31, 2012—only days before Election Day 2012—282 applicants had been flagged as requiring additional certification, mostly involving additional citizenship certification of newly naturalized citizens.[6] Calls to county election boards inquiring about the flagged status only led to conflicting instructions and information.[7] Volunteers from certain community-based organizations were told by the contacted counties that the challenged applicants received notification by mail; however, many applicants stated that they had received no

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[5] Election 2012: Voting Laws Roundup (Oct. 16, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/#edn2.

[6] Letter from Asian Amer. Legal Advocacy Ctr. of Georgia to GA Sec'y of State Brian Kemp, Re: 574 Unprocessed and Challenged Voter Registration Applicants, October 31, 2012, available at http://aalegal.org/2012/10/31/aalac-sends-open-letter-to-secretary-of-state-on-behalf-of-574-new-voters-who-have-not-been-processed/.

[7] Id.

such notifications.[8] In addition, 14 other states—California, Colorado, Connecticut, Maine, Massachusetts, Michigan, Missouri, New Hampshire, Nevada, Oregon, South Carolina, Texas, Virginia and Washington—have introduced legislation requiring proof of citizenship to register to vote.[9]

ARGUMENT

Proposition 200 Creates Barriers to Voting and Registration For Asian American Voters

Justice O'Connor wrote that:

> The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State's borders.

See Zobel v. Williams, 457 U.S. 55, 68-69 (1982) (O'Connor, J. concurring). All eligible citizens, either naturalized or native-born, have the right to vote, which is engrained in the principles and text of the United States Constitution. Proposition 200 unfairly places additional barriers to this right on naturalized citizens—burdens that are not borne by native-born citizens.

Historically, Asian Americans have faced significant discrimination and barriers to political participation. For example, legislative efforts have

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[8] Id.

[9] Election 2012: Voting Laws Roundup (Oct. 16, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/#edn2.

limited the Asian American community's access to this country's borders. *See, e.g.*, Philippine Independence Act of 1934; Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952). In 1868, just a few years before completion of the transcontinental railroad, the United States signed the Burlingame Treaty.[10] This treaty denied citizenship to the Chinese laborers who built the railroad, and barred the wives of day laborers from entering the United States. Congress later passed the Chinese Exclusion Act,[11] which barred Chinese immigration for 10 years. After the Act expired, additional legislation required all Chinese immigrants to register with the government and carry proof of residency.[12] Similar restrictions barred citizenship for Chinese women who were married to American citizens,[13] while the Cable Act[14] threatened to strip Chinese American women of citizenship if they married foreign-born Asians.

Though such immigration policies were later abandoned and Asian Americans were eventually able to gain citizenship in the United States, discrimination against Asian Americans continued

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10 The Burlingame Treaty of 1868, U.S.-China, 16 Stat. 739 (1868).

11 Chinese Exclusion Act, 22 Stat. 58 (1882) (repealed 1943).

12 See id.

13 Act of March 2, 1907, § 3, 34 Stat. 1228, 34 Stat. 1228 (1907).

14 Cable Act, 42 Stat. 1022 (1924).

through barriers to voting and political participation. *See generally* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 Harv. C.R.-C.L. L. Rev. 385 (2008); *see generally* Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 Asian L.J. 31 (2004). Today, Proposition 200 perpetuates some of those same barriers. Additional documentation requirements diminish voter turnout and often result in apathy. *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 Harv. L. & Pol'y Rev. 185, 193 (2009). This is particularly true given the history of discrimination discussed above, the high percentage of naturalized or "new" citizens among Asian Americans, and the lack of familiarity of new Asian American citizens with the voting process.

Rather than safeguarding the right to vote, Proposition 200 could deprive people who may rightfully exercise their right to vote from doing so. For example, under Proposition 200, native-born citizens may mail copies of their U.S. birth certificates to the county recorder, but naturalized citizens have no such option since they do not possess a United States birth certificate. Instead, to register, a naturalized citizen may provide a naturalization certificate in person (but not by mail) to the county recorder. *See* Ariz. Rev. Stat. § 16-166(F)(4).

These barriers to voter registration are disproportionately arduous to Asian Americans in Arizona, a high percentage of whom are naturalized

citizens. Of the estimated 194,475 Asian Americans living in Arizona, approximately 35.9% are foreign-born naturalized citizens. *See* U.S. Census Native and Foreign-Born Populations Data. Thus, almost 40% of the Asian American community may encounter the challenges erected by Proposition 200 when attempting to register to vote.[15] In short, the barriers Asian American citizens encounter as a result of Proposition 200 have the effect of limiting political participation by the Asian American community.[16]

Second, Proposition 200 allows for naturalized citizens to register to vote by supplying their Naturalization Number. The parties do not dispute, however, that such number cannot be verified with the federal government and, therefore, any application that furnishes only the Naturalization Number would be automatically rejected. *See Gonzalez v. Arizona*, Nos. 08-17094, 08-17115 (9th Cir. filed Feb. 2, 2009), Opening Brief of Appellants Maria Gonzalez, et al., at 9-10, ECF No. 28 ("There is no dispute that the number of the certificate of naturalization cannot be verified with the federal government. Thus, no naturalized citizen can register by providing his or her naturalization

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[15] Many Asian Americans prefer using the Federal Form because it is available in certain Asian languages, including Chinese, Korean, Vietnamese, and Tagalog. *See* Voter Registration and Education, http://www.azsos.gov/election/VoterRegistration.htm#Proof (last visited Jan. 7, 2013). Neither Arizona's voter registration form nor its instructions regarding the additional documentation requirements are available in these Asian languages. *See id.*

[16] We also adopt the arguments set forth in the Brief of Respondents The Inter Tribal Council of Arizona, Inc.

certificate number on the voter registration form.") (the "Gonzalez Ninth Circuit Opening Brief").

Third, many Asian Americans register to vote through community-based organizations, such as the Georgia-based Center for Pan Asian Community Services. Due to the confusion caused by the additional proof requirements, Proposition 200 hampers the ability of such organizations to conduct voter registration drives. As noted above, in Georgia (which has a law that closely resembles Proposition 200), 282 applicants had been flagged as requiring additional certification, much of which related to proof of citizenship for new Asian citizens.[17] Moreover, given that these organizations are community-based and often leanly staffed, it can be difficult for such organizations to help potential new registrants overcome the hurdles to registration erected by Proposition 200.

Finally, for many naturalized citizens, the documents acceptable under Proposition 200 are not readily available—official copies of the United States naturalization certificate cost $345.[18]

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[17] Letter from Asian Amer. Legal Advocacy Ctr. of Georgia to GA Sec'y of State Brian Kemp, Re: 574 Unprocessed and Challenged Voter Registration Applicants, October 31, 2012, available at http://aalegal.org/2012/10/31/aalac-sends-open-letter-to-secretary-of-state-on-behalf-of-574-new-voters-who-have-not-been-processed/.

[18] *See* N-565, Application for Replacement Naturalization/Citizenship Document, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a910cac09aa5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

CONCLUSION

For the foregoing reasons, this Court should: (i) affirm the decision of the United States Court of Appeals for the Ninth Circuit, sitting *en banc*; and (ii) find Proposition 200 invalid.

Dated: January 22, 2013

Respectfully Submitted.

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST OF ADDITIONAL *AMICI CURIAE*

Alliance of South Asian American Labor

The Alliance of South Asian American Labor ("ASAAL") is a community-based organization founded by trade unionists that are of South Asian heritage. ASAAL's mission is to increase civic participation in the larger South Asian American community based on their organizing experiences in the labor movement.

Asian and Pacific Islander American Vote – Michigan

Asian and Pacific Islander American Vote – Michigan ("APIAVote-MI") is a nonpartisan 501(c)(3) nonprofit organization that serves the Asian Pacific Islander American community in Michigan through civic participation, advocacy, and education. APIAVote-MI registered over 700 voters, mobilized over 20,000 voters, conducted poll monitoring/exit polling, and distributed a multilingual voter guide during the 2012 election.

Center for Pan Asian Community Services, Inc.

The Center for Pan Asian Community Services, Inc. ("CPACS") is a private nonprofit located in Atlanta, Georgia and its mission is to promote self-sufficiency and equity for immigrants, refugees, and the underprivileged through comprehensive health and social services, capacity building, and advocacy. CPACS has sponsored numerous events and provided community services such as voter registration drives, polling site assistance, exit polling, voter education, etc. during the most recent election cycle. CPACS supports the protection and

advancement of the voting rights of Asian and Pacific Islander Americans.

Chhaya Community Development Corporation

The Chhaya Community Development Corporation seeks to create stable and sustainable communities by increasing civic participation and addressing the housing and community development needs of New Yorkers of South Asian origin and their neighbors.

Chinese Community Federation of Atlanta

The Chinese Community Federation of Atlanta's mission is to serve the Atlanta Chinese community, to promote harmony and unity, to advocate equal benefits and rights, among other things.

Coalition of Asian Pacific Americans of Virginia

The Coalition of Asian Pacific Americans of Virginia is a 501(c)(3) nonprofit organization whose mission is to provide a common and united voice to advocate for the social, economic, cultural and business interests of all Asian Pacific Americans in Virginia.

Korean American Civic Empowerment

Korean American Civic Empowerment's mission is to empower the Korean American community by promoting civic participation.

Korean Americans for Political Advancement

Korean Americans for Political Advancement ("KAPA") is a membership organization promoting progressive policies that advance the political and civil rights of all citizens, the rights of all immigrants, and economic and social justice for all individuals and communities. Through lobbying, grassroots organizing, and political action, KAPA also strives to encourage the civic participation and

help organize the political power of individuals—particularly, Korean American individuals residing in the New York metropolitan area—in ways that advance KAPA's advocacy purpose.

MinKwon Center for Community Action

The MinKwon Center for Community Action ("MinKwon") was established to meet the needs and concerns of the Korean American Community through education, civic participation immigrant rights, social services, and culture in New York. MinKwon works with various grassroots organizations on immigration policy and voter rights. MinKwon has conducted election poll monitoring/exit polling for the past several elections, including the 2008 election.

Organization of Chinese Americans – Georgia

Organization of Chinese Americans – Georgia ("OCA-GA"), founded in 1983, is the local Georgia chapter of OCA. Through local events and community involvement, OCA-GA aims to promote the general welfare of Chinese Americans and other Asian Americans while meeting the goals and objectives as set forth by OCA National. Founded in 1973, OCA is a national organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans in the United States. OCA is dedicated to securing the rights of Chinese American and Asian American citizens and permanent residents through legislative and policy initiatives at all levels of the government. OCA aims to embrace the hopes and aspirations of the nearly two million citizens and residents of Chinese ancestry in the United States as well as to better the

lives of the ten million Asian Americans across the country.

Organization of
Chinese Americans – Greater Houston

Organization of Chinese Americans – Greater Houston ("OCA Houston"), founded in 1979, is the local Houston chapter of OCA. OCA Houston is dedicated to the national organization's mission of advocating for and protecting and advancing the rights of Chinese Americans and Asian Pacific Americans.

Taking Our Seat

Taking Our Seat seeks to empower South Asian-Americans in the electoral process. Taking Our Seat works to stop voter dilution by redrawing political district boundary lines to keep South Asian-American communities together.

AMICUS CURIAE BRIEF

No. 12-71

In the

Supreme Court of the United States

ARIZONA, et al.

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC. et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals interpreted the National Voter Registration Act 42 U.S.C. §§ 1973gg *et seq.* as prohibiting states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature." The questions presented by this case are:

1. Did Congress intend to prohibit states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature?"

2. Does Congress have authority to prohibit states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature?"

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Rules

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in preserving the division of power outlined in the Constitution. The Founders designed this division as a means to protect individual liberty. Nowhere is this more evident than the division between the States and Congress in the regulation of qualifications of voters in federal elections.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioner has filed a blanket consent with the clerk and letters evidencing consent from the other parties have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Arizona has established qualifications for voting in state elections, including the requirement of citizenship. Ariz. Rev. Stat. § 16-101A.1. To ensure that proposed registrants meet the state qualifications they are required to provide documentary evidence of citizenship. Ariz. Rev. Stat. § 16-166F. Any state issued identification card or any document sufficient to prove citizenship for federal purposes are two possible means of meeting this requirement. *Id.*

The Ninth Circuit Court of Appeals ruled that these state law requirements conflicted with the National Voter Registration Act. According to the court below, that Act (and this application of the Act) were within Congress' powers granted by Article I, section 4 to regulate the time, place, or manner for holding federal elections. The problem with this analysis is that neither the state law nor the Ninth Circuit's interpretation of the National Voter Registration Act concern the time, the place, or the manner of holding an election. Instead, the state law relates to qualification of electors – a matter that the Constitution assigns to state regulation.

Article I, section 2 expressly leaves qualification of electors to state law. Any state law defining voter qualification or establishing a means for determining that the voter meets the qualification is outside the purview of Congress except in the exceedingly narrow circumstance of the exercise of power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. There can be no argument for a broad power of Congress under either of these provisions to strip states of the power to regu-

late qualifications, and proof of qualifications, to vote in state and federal elections. The later enacted Seventeenth Amendment continued to recognize the exclusive power of the states to set the qualifications of voters in federal elections. Thus, on the record presented in this case, Congress has no power to set qualifications of electors in state and federal elections nor does it have the power to strip the states of the ability to require proof of qualification to vote at either the time of registration or the time of voting.

ARGUMENT

I. THE QUALIFICATION OF ELECTORS CLAUSE IN ARTICLE I, SECTION 2 GOVERNS THIS CASE, NOT THE ELECTIONS CLAUSE OF SECTION 4

The constitutional provisions relating to election of Members of the House of Representatives (and later the Members of the Senate) seek to protect the integrity of the federal government while at the same time protect against tyranny by that same government. By vesting power to override state law on the time, place, and manner of elections, the Constitution protects against state attempts to frustrate formation of the biennial House of Representatives. By denying Congress the authority to set qualification of electors, however, the Constitution protected against the tyranny of a government more intent on preservation of elective office than on securing individual liberty. The court below failed to pay heed to the different purposes of these provisions and thus reached a conclusion that writes the Qualification of Electors Clause out of the Constitution.

A. The Elections Clause Only Governs the Mechanics of Voting in Federal Elections Once Qualifications To Vote Have Been Established

Article I, section 4 of the Constitution grants power to Congress to override state regulation of the mechanics of federal regulation. Specifically, Congress is given the power to "make or alter" regulations regarding the "times places, and manner of holding elections for Senators and Representatives." U.S. Const., Art. I, § 4. The text is quite explicit in outlining the power of Congress to regulate federal elections. Congress was not given general power over all matters relating to an election. Instead, the text expressly defines only three areas of regulation in which congressional control is appropriate: the time, the place, and the manner of holding the election.

In the debate over the ratification of the Constitution, Alexander Hamilton argued that Congress' power to regulate elections was "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60* (Alexander Hamilton), (Clinton Rossiter, ed. 1961) at 371 (emphasis in original). James Madison explained that the purpose of the provision was to prevent dissolution of the federal government by state regulation that prevented a House of Representatives from being formed. *James Madison, Debates*, reprinted in 10 The Documentary History of the Ratification of the Constitution (Virginia, No. 3) John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, editors (Univ. Virginia Press 2009) at 1260.

The ratification debates emphasize the limitation on this delegation of power to Congress: "Congress therefore were vested also with the power just given to the legislatures—that is, the power of prescribing merely the circumstances under which elections shall be *holden*, not the qualifications of the electors, nor those of the elected." *A Pennsylvanian to the New York Convention, Pennsylvania Gazette*, June 11, 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1145 (emphasis in original). In essence, this power extends only to the "*when, where,* and *how*" of elections. *Sedgwick, Theophilus Parsons: Notes of Convention Debates*, January 16, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1211 (emphasis in original).

The central concern of the framers was the timing of the elections in the states. Unless there was federal control over that timing, states could prevent a full House from being elected in time to allow a session of Congress. *James Madison, Debates*, reprinted in 10 The Documentary History, *supra*, (Virginia, No. 3) at 1260; *The Federalist No. 59* (Alexander Hamilton), *supra* at 362 ("*every government ought to contain in itself the means of its own preservation.*" Emphasis in original.); *The Federalist No. 61* (Alexander Hamilton), *supra* at 375. A number of the arguments in the ratification debates use Rhode Island as an example of what a dissenting state might do to prevent the House of Representatives from sitting. *A Pennsylvanian to the New York Convention, Pennsylvania Gazette*, 11 June 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1144; *A Landholder IV, Connecticut Currant*, November 26, reprinted in 3 The Documen-

tary History, *supra* (Delaware, New Jersey, Georgia, and Connecticut) at 479. Rhode Island's anti-federalist legislature refused to call a convention to consider the new Constitution. *See Massachusetts Centinel, 26 December*, reprinted in 5 The Documentary History, *supra* (Massachusetts No. 2). The power of Congress to regulate the time of federal elections prevents states that oppose the federal government from refusing to schedule a federal election. *The Federalist No. 61* (Alexander Hamilton), *supra* at 375; *James Madison, Convention Debates*, reprinted in 10 The Documentary History, *supra* (Virginia No. 3) at 1260.

The regulation of the place of federal elections was thought to be a tool against disenfranchisement. *James Madison, Convention Debates*, reprinted in 10 The Documentary History, *supra* (Virginia No. 3) at 1260; *Jeremy Belknap: Notes of Convention Debates, 21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3); *King, Convention Debates, 21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1279. There were several mentions in the ratification debates noting that Charleston. South Carolina had 30 representatives in the state legislature out of a total of 200. Rural areas argued that this arrangement gave all the political power in the state to Charleston. *Id.* Section 4 of Article I was meant to ensure that Congress had the power to prevent similar unequal representation from occurring in the House of Representatives.

There are a few mentions of different election mechanical issues regarding the manner of holding election. One supposed it could require a paper bal-

lot rather than a voice vote. *Thomas McKean, Convention Debates*, reprinted in 2 The Documentary History, *supra* (Pennsylvania) at 537; *U.S. Term Limits v. Thorton*, 514 U.S. 779, 833 (1995) (*quoting* Madison during convention debates). Another argued that the provision allowed Congress to choose between a majority or a plurality vote requirement. *Federal Farmer: An Additional Number of Letters to the Republican*, New York, 2 May 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1021. The common feature is that all of these concerns are with the mechanics of the actual election rather than the qualifications of the electors. *Convention Debates, 21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1279 ("for the power of controul given by this sect, extends to the *manner* of election, not the *qualifications* of the electors." (Emphasis in original)).

This Court's opinions on the reach of section 4 are not to the contrary. This Court has acknowledged that section 4 gives Congress to set a uniform national date for elections. *Foster v. Love*, 522 U.S. 67, 68-72 (1997). The Court has long-recognized that the "manner" of election included a power to compel selection of representatives by district. *Ex parte Siebold*, 100 U.S. 371, 384 (1879). Congress also has power over redistricting and political gerrymandering pursuant to this section. *Branch v. Smith*, 538 U.S. 254, 259 (2003); *Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004).

Justice Black argued in *Oregon v. Mitchell*, 400 U.S. 112 (1970) that the power in Section 4 to override state regulation also extended to overriding state elector qualifications identified in Section 2.

Id. at 315 (Black, J.) No other justice of this Court accepted this reasoning. Indeed, Justice Harlan convincingly demonstrated that such a result was contrary to the intent behind Section 2. *Id.* at 210 (Harlan, J.). Justice Harlan was correct. Section 2 expressly recognizes state control over voter qualifications.

B. Article I, Section 2 places Exclusive Control of Regulating Qualification To Vote in Federal Elections in the States

While the Constitution assigned ultimate control over the mechanics of federal elections to Congress, states were assigned exclusive control over the *qualifications* of the electors. This was, in part, a recognition that the new Constitution created a government that was both "federal" and "national" in character. States already controlled the qualification of voters for the state legislature. The Framers and Ratifiers saw no good reason to create a national uniformity on voter qualification. There was express recognition that different states would have different voter qualification requirements. *King, Theophilus Parsons: Notes of Convention Debates, 17 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1240-41. So long as the qualification was tied to the state qualification to vote for the most numerous branch of the state legislature, the people had the ability and motive to protect their franchise. *A Landholder IV, Connecticut Courant, 26 November*, reprinted in 14 The Documentary History, *supra* (Commentaries on the Constitution, No. 2) at 233 ("Your own assemblies are to regulate the formalities of this choice, and unless they betray you, you cannot be betrayed"). On the other hand, there were good

reasons to keep the power out of the hands of Congress.

At the convention, James Madison argued forcefully against granting Congress the power to dictate the qualifications of electors. If Congress could regulate the qualifications of electors, Madison argued, "it can by degrees subvert the Constitution." *Oregon*, 400 U.S. at 210 (Harlan, J.) *quoting* Madison during Convention Debates. Madison made a similar argument in the Federalist Papers. Leaving qualification of electors to Congress would have "violated a fundamental article of republican government." *The Federalist No. 52* (James Madison), *supra* at 325-26.

Even beyond this political design, the commitment of voter qualification to state law served another purpose during the ratification debate. One of the chief fears of those arguing against ratification was that the new federal government would annihilate the states. This was a significant fear and was addressed in the ratification debates in Connecticut, Massachusetts, and Virginia. *A Landholder IV*, *Connecticut Currant*, November 26 reprinted 14 The Documentary History (Commentaries No. 2) at 233; *Gen. Brooks*, *Convention Debates*, January 24, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3); *Virginia Independent Chronicle*, November 28, reprinted in 8 The Documentary History, *supra* (Virginia No. 1) at 177-78. The Elector Qualification Clause was seen as the chief argument against this fear.

How could Congress do away with the States when the States had so much control over the election of federal representatives? "Congress cannot be organized without repeated acts of the legislatures of

the several states." *Gen. Brooks, Convention Debates*, January 24, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3). The same point was argued in Virginia and other states. *An Impartial Citizen VI, Petersburg Virginia Gazette*, March 13, reprinted in 8 The Documentary History, *supra* (Virginia No. 1) at 495 ("How can there be a House of Representatives, unless its members be chosen? How can its members be chosen, unless it be known and ascertained who have a right to vote in their election?"); *A Landholder IV, Connecticut Currant*, November 26 reprinted in 3 The Documentary History, *supra* (Delaware, New Jersey, Georgia, and Connecticut) at 480 ("The national Representatives are to be chosen by the same electors, and under the same qualifications, as choose the state representatives; so that if the state representation be dissolved, the national representation is gone of course. State representation and government is the very basis of the congressional power proposed.")

II. NEITHER SECTION 5 OF THE FOURTEENTH AMENDMENT NOR SECTION 2 OF THE FIFTEENTH AMENDMENT GIVE CONGRESS POWER TO PROHIBIT STATES FROM ENSURING ONLY CITIZENS VOTE IN FEDERAL ELECTIONS

Both the Fourteenth and Fifteenth Amendments grant Congress power to enforce Equal Protection and Voting Rights. Neither, however, strips states of the power to determine the qualifications of electors that are not themselves discriminatory. Indeed, state power to define voter qualifications in federal elections was repeated in the later-enacted Seventeenth Amendment. U.S. Const. Amend. 17 ("The

electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.").

Section 5 of the Fourteenth Amendment (and by extension, Section 2 of the Fifteenth Amendment) give Congress the authority to *enforce* the substantive provisions of the amendment. Thus, Congress can outlaw racially discriminatory voting practices. *City of Rome v. United States*, 446 U.S. 156, 173-74 (1980). The enforcement power, however, is remedial and must be proportionate to the harm sought to be remedied. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-83 (2000); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 225-26 (2009); *Coleman v. Court of Appeals of Maryland*, __ U.S. __, 132 S. Ct. 1327, 1333-34 (2012).

The question in this case is whether Arizona can enforce its laws prohibiting noncitizens from voting. Ariz. Rev. Stat. § 16-101. There is no evidence that Congress enacted the National Voter Registration Act to require states to open voting to noncitizens. Indeed, the Act specifically recognizes citizenship as a legitimate voter qualification. 42 U.S.C. § 1973gg-7(b)(2)(A). Congress further authorized requirements that individuals registering to vote provide "other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

There is nothing here showing that Congress attempted to invoke authority under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. Congress neither sought to require states to permit noncitizens to vote nor to prohibit

states from collecting the information necessary to establish citizenship.

More to the point, Congress would have no power to require states to allow noncitizens to vote in either state or federal elections. Congress cannot define the disenfranchisement of noncitizens as a violation of the Equal Protection Clause. *See City of Boerne*, 521 U.S. at 518-19. The Fifteenth Amendment itself restricts the franchise to "citizens." U.S. Const., Amend 15 (The right of *citizens* of the United States to vote shall not be denied." (emphasis added)). This theme is also carried in the decisions of this Court. *See, e.g., Reynolds v. Simms*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote."); *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote ... [is] a right secured by the Constitution.").

Congress did not and could not invoke its power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment to prohibit Arizona from requiring proof of citizenship of applicants for voter registration.

CONCLUSION

The court below analyzed the question in this case as one of time, place, or manner of an election. That was clearly wrong. Arizona's statute requires proof that an applicant is qualified to vote. It is a regulation of elector qualification. As such, it is a regulation that the Constitution assigns to the states. Congress has no power, unless it seeks to remedy a violation of the Fourteenth or Fifteenth Amendment, to set voter qualifications. States have

the power to set the qualifications and to require proof of those qualifications at the time of registration and on election day.

DATED: December, 2012.

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AMICUS CURIAE BRIEF

No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., AND JESUS M. GONZALEZ, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF COMMUNITY VOTER REGISTRATION ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of organizations engaged in community-based voter registration activities as *amici curiae* in support of respondents.[1] Collectively, these organizations educate about, and assist with, voter registration for the population as a whole and for underrepresented portions of the electorate in particular. In that capacity, *amici* organizations have a special interest and an expertise concerning voter registration efforts and the detrimental effect of laws imposing burdensome documentation requirements on the ability of qualified citizens to register to vote.

Rock the Vote is a nonprofit, nonpartisan organization dedicated to engaging young people in our nation's democracy. Its principal activities include assisting young voters with registering to vote and getting young voters out to the polls. It also engages in widespread public education efforts, including public service announcements, voter information distribution led by community street teams, and a highly trafficked website at www.rockthevote.com that offers extensive voting and election information and online opportunities to register to vote using the federal voter registration form. Millions of young

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

Americans have registered to vote via Rock the Vote, and in 2012 nearly 15,000 Rock the Vote voter registration applications were submitted in Arizona alone.

The **National Association for the Advancement of Colored People ("NAACP")** was founded in 1909 and is the nation's oldest and largest civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state, and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; and to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof.

Border Action Network is an Arizona-based human rights organization that focuses on border and immigrant communities. Through its Civic Engagement Campaign, it educates the public about their voting rights, assists individuals with voter registration applications, and takes part in poll monitoring at locations throughout the state.

Fair Share Alliance and the **Fair Share Alliance Education Fund** are national non-profits active in 24 states, including Arizona, where the organization does business as Arizona Fair Share. Through door-to-door community outreach and grassroots lobbying, it advocates for the economic

interests and democratic rights of working families. More than 165,000 voter registration applications from individuals in six different states were collected and submitted by Fair Share Alliance Education Fund in 2012.

Mi Familia Vota is a national non-profit organization headquartered in Arizona. It works to unite the Latino community and its allies to promote social and economic justice through increased civic participation. Mi Familia Vota engages in community-based voter registration activities in Arizona and several other states, with a focus on assisting Latino voters to register.

The **National Coalition on Black Civic Participation** is a non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. Founded in 1976, it has spent over 37 years working at the local, state, and national level to address disenfranchisement of underserved and marginalized communities through voter empowerment organizing and training, young adult civic leadership development, women and girls empowerment, and grassroots organizing and issue education.

Nonprofit VOTE is a national non-partisan organization that partners with America's non-profits to help them integrate voter engagement into their ongoing activities and services. It provides education and guidance to non-profits through its webinars, online resource center, newsletter, and blog. Its national partners include Big Brothers Big Sisters, the Boys & Girls Clubs of America, the Nation-

al Association of Community Health Centers, and the Military Voter Protection Project.

People For the American Way Foundation is a non-partisan citizens' organization established in 1981 to promote and protect civil and constitutional rights, including the right to vote. Its Young People For program is a strategic long-term leadership development project that identifies, engages, and empowers the newest generation of leaders to create lasting change in their communities. Its civic engagement campus-organizing program aims to increase the participation and representation of young people in the electoral process while building the skills and leadership of Young People For Fellows to better prepare them to lead civic engagement campaigns beyond election cycles. Its members conducted voter registration campaigns in several states, including Arizona, during the 2012 election cycle.

Promise Arizona and **Promise Arizona in Action** are non-profit organizations dedicated to recruiting, training, and supporting a new generation of leaders in Arizona. Their volunteers have assisted more than 50,000 new voters to register over the past three years, and they have also engaged in extensive get out the vote efforts in Arizona.

Protecting Arizona's Family Coalition is a non-partisan alliance of health and human service groups throughout Arizona. Collectively, its members have an estimated 20,000 staff, board members, and volunteers who serve more than 1.5 million people. It provides voter engagement resources to assist its members in empowering the populations they serve to register and vote.

Virginia New Majority is the largest statewide grassroots civic engagement organization in Virginia. It engages underrepresented communities throughout the Commonwealth through voter registration drives, issue education, get out the vote activities, and election protection efforts. Since 2008, Virginia New Majority has contacted over 400,000 voters.

Voto Latino is a national non-partisan organization that focuses on the civic engagement of American Latinos. It is dedicated to bringing new and diverse voices into the political process by engaging youth, media, technology, and celebrities to promote positive change. Voto Latino has assisted more than 225,000 young Latinos to register to vote.

SUMMARY OF ARGUMENT

The exclusion of eligible citizens from the political process is one of the most serious and stubborn problems in our democracy. Census Bureau data show that less than two-thirds of adult citizens are registered to vote nationwide, compared to registration rates above 90% in Canada and in many European countries. More troublingly, the registration rate drops precipitously among particular groups: low-income persons, racial and ethnic minorities, the young, and naturalized citizens. Arizona is not an exception to the national picture: its registration rate, both overall and for racial and ethnic minorities and younger citizens, mirrors that of the United States as a whole.

The National Voter Registration Act ("NVRA") was enacted in 1993 to increase the number of registered and participating voters. It expressly recog-

nizes the important role that registration drives and other community-based voter registration efforts play in broadening the electorate, and federal courts around the country have held that laws that unduly impair those efforts violate the NVRA. Community-based voter registration is important to the NVRA's aims for one simple reason: it works. By taking registration to prospective voters—holding registration drives in community gathering spots such as schools, churches, local festivals, and even movie theaters—it eliminates many of the commonly cited barriers to registration, including lack of time, mobility impairments, and lack of understanding of the registration process.

Arizona's Proposition 200 is an assault on community-based registration methods. By requiring that voter registration applications be accompanied by one of a specified list of documents proving the citizenship status of the applicant, the law makes it immensely more difficult for community-based registration to take place. A significant portion of Arizona's population does not have the necessary documentation to comply with Proposition 200, and many forms of acceptable documentation—birth certificates, passports, naturalization documents, and the like—are not commonly carried by individuals in their daily lives. Because community-based registration efforts overwhelmingly rely on approaching individuals who did not plan in advance to register at that time or location, the documentation requirement makes it impossible for groups engaged in those efforts to assist many otherwise eligible and willing citizens to register to vote. And even when a prospective registrant does happen to be carrying

one of the required documents, logistical hurdles—ranging from an inability to photocopy documents on the spot to an unwillingness to hand over sensitive identification documents to registration drive volunteers—greatly hinder community-based registration efforts.

Because the individuals most likely to be disenfranchised are also disproportionately likely to lack acceptable documentation of citizenship (or lack ready access to those documents when approached at a community-based registration event), previously effective efforts to reach these voters through community-based registration are stymied by Proposition 200. Groups engaged in community-based voter registration in Arizona have already felt these effects. Testimony at the trial in this case, as well as the experiences of the signatories to this brief, demonstrates that Proposition 200 makes registration efforts more difficult, less effective, and more expensive. Contrary to the command of the NVRA, Proposition 200 unduly impairs voter registration when tens of millions of eligible persons remain unregistered to vote. This Court must not countenance that result.

ARGUMENT

Congress enacted the NVRA to, *inter alia*, establish "procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). Congress further required that the law be implemented "in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(2). The NVRA accomplishes these pur-

poses in part by facilitating community-based voter registration drives through the use of a uniform federal mail-in registration form, "with particular emphasis on making the[form] available for organized voter registration programs." 42 U.S.C. § 1973gg-4(b); *see also* S. Rep. No. 103-6, at 12 (1993) ("Mail registration is an effective means for increasing the voter rolls because . . . it permits organizations to go to the voter with organized registration drives. Mail registration is convenient for the voter, for registration drive organizers and for voter registrars as well."); H.R. Rep. No. 103-9, at 10 (1993).

Arizona's Proposition 200 frustrates the purpose and operation of the NVRA because it interferes with the community-based voter registration efforts the NVRA aims to facilitate. The result is that many qualified citizens will not be able to register to vote, thereby depriving them of the ability to participate in our nation's political process. This Court should reject Arizona's attempts to encroach upon the NVRA and to hinder community-based voter-registration efforts.

I. MANY QUALIFIED CITIZENS ARE NOT REGISTERED TO VOTE, AND COMMUNITY-BASED REGISTRATION EFFORTS ARE A CRITICAL AND EFFECTIVE MECHANISM TO INCREASE VOTER PARTICIPATION

A. In Arizona And Across The United States, Voter Registration Rates Are Low And Some Groups Are Significantly Underrepresented In The Electorate

Arizona's registered voter population is substantially smaller than its qualified voter pool, and the problem is measurably worse among groups traditionally underrepresented in the electorate. In 2010, only 66% of citizens of voting age in Arizona were registered to vote. U.S. Census Bureau, *Voting and Registration in the Election of November 2010 – Detailed Tables* [hereinafter "*Voting and Registration*"], Table 4a (2010).[2] For Black and Hispanic citizens, registration rates were even lower: only 65.5% of Black citizens and 57.5% of Hispanic citizens were registered to vote, compared with 68.7% of White, non-Hispanic citizens. U.S. Census Bureau, *Voting and Registration*, Table 4b.[3] Age also played a significant role. Among citizens of all races ages 18 to

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[2] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[3] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html. All figures refer to voting-age citizens only.

24, the registration rate was a dismal 48%. U.S. Census Bureau, *Voting and Registration*, Table 4c.[4]

Nationally, the picture is similar. In 2010, 65.1% of voting-age citizens nationwide reported being registered to vote. Again, race and ethnicity were significant factors: 68.2% of White, non-Hispanic citizens were registered compared with 62.8% of Black citizens, 51.6% of Hispanic citizens, and 49.3% of Asian citizens. U.S. Census Bureau, *Voting and Registration*, Table 2.[5] As in Arizona, registration rates were particularly low among young people—only 45.3% of citizens ages 18 to 24 years were registered to vote. U.S. Census Bureau, *Voting and Registration*, Table 1.[6] And the effects of race and age compounded one another. Only 34.5% of Hispanic citizens ages 18 to 24 were registered to vote, compared with 46.4% of Black citizens and 48.3% of White, non-Hispanic citizens in the same age group. U.S. Census Bureau, *Voting and Registration*, Table 2.[7]

Income is also strongly associated with registration rates. Only 52.0% of voting-age citizens with a

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[4] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[5] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html. The biggest difference between Arizona and the national figures was the registration rate for Asian citizens, which is nearly 30% higher in Arizona than nationwide.

[6] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[7] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

family income of $10,000 or less were registered to vote, while 80.3% of those with a family income of $150,000 or more were registered. U.S. Census Bureau, *Voting and Registration*, Table 7.[8]

Finally, there is a substantial disparity in registration rates of native-born versus naturalized citizens. Just over 66% of native-born citizens of voting age reported being registered in 2010, compared with only 54.2% of naturalized citizens. U.S. Census Bureau, *Voting and Registration*, Table 11.[9] The exceptions were Asians and Hispanics, both of whom reported slightly higher rates of registration among naturalized citizens than among native-born members of those groups. *Id.* But in both cases, even among the naturalized population nearly half of voting-age citizens (49% of Asians and 47.1% of Hispanics) did not report being registered to vote. *Id.*

That the United States has a serious problem with voter registration is particularly clear when one considers the registration rates in other democracies. In Great Britain, for example, 97% of eligible voters were registered in 2008. Jennifer S. Rosenberg and Margaret Chen, *Expanding Democracy: Voter Registration Around the World*, 3 (June 2009).[10] In Canada and Germany, 93% of eligible voters were regis-

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[8] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[9] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[10] *Available at* http://www.brennancenter.org/content/resource/expanding_democracy_voter_registration_around_the_world/.

tered, as were 92% in Australia and 91% in France. *Id.* And despite historical disenfranchisement of the majority of its population and continuing high rates of poverty and illiteracy, South Africa had a 77% registration rate in 2009. *Id.*; *see also* CIA, *The World Factbook* (reporting a poverty rate of 50% and a literacy rate of 86.4% in South Africa, compared with a poverty rate of 15.1% and a literacy rate of 99% in the United States).[11] The fact that the United States consistently experiences voter registration rates far below comparative national figures demonstrates that our country can ill afford to retrench on access to voter registration. To the contrary, additional barriers to registration absolutely must be avoided.

B. Community-Based Initiatives Play A Crucial Role In Increasing Voter Registration Rates

Difficulties with access to or education about registration play an important role in explaining why tens of millions of eligible Americans remain unregistered to vote. When asked by the Census Bureau in 2008 why they did not register, 14.7% of non-registrants reported that they had not met registration deadlines, 6% cited permanent illness or disability, 4.2% said that they did not know where or how to register, and 1.4% cited difficulty with English as the reason they had not registered. Thom File and Sarah Crissey, U.S. Census Bureau, *Voting and Registration in the Election of November 2008*, 14 (July

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[11] *Available at* https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html.

2012).[12] Hispanic registrants were more likely to report that they did not register because they had not met registration deadlines, did not know where or how to register, or had difficulty with English, Black non-registrants disproportionately cited registration deadlines or a permanent illness or disability, and Asian non-registrants were far more likely to report difficulty with English as the reason they had not registered. *Id.*; *see also* Tova Wang and Youjin B. Kim, *From Citizenship to Voting: Improving Voter Registration for New Americans*, 10-11 (Dec. 2011).[13]

Similarly, in a 2006 survey conducted by the Pew Institute and the Associated Press, 19% of non-registrants said that they had not registered because they were too busy or just had not done it, 17% said they had recently moved, and 4% cited illness or disability as the reason. The Pew Research Center For The People & The Press, *Regular Voters, Intermittent Voters, and Those Who Don't: Who Votes, Who Doesn't, And Why*, 4 (Oct. 2006).[14] These figures suggest that a significant portion of those individuals who have not registered to vote might do so if registration were more convenient.

Community-based voter registration efforts are designed to serve precisely that function. They aim to eliminate the most common barriers to registra-

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[12] *Available at* http://www.census.gov/prod/2010pubs/p20-562.pdf.

[13] *Available at* http://www.demos.org/publication/citizenship-voting-improving-registration-new-americans.

[14] *Available at* http://www.people-press.org/files/legacy-pdf/292.pdf.

tion by going *to* potential voters and facilitating the registration process—including by explaining the requirements and providing assistance filling out forms. These efforts contrast with traditional registration methods, which require voters themselves to take the initiative to locate the correct forms or to identify and travel to one of the government offices that provides registration forms.

Community-based registration efforts have proven highly effective. "From 2000 to 2008, community-based groups registered tens of millions of new voters, including close to nine million in 2008 alone." NAACP, *Defending Democracy: Confronting Modern Barriers to Voting Rights in America*, 15 (2012) (citing U.S. Census Bureau, Voting and Registration, Table 14).[15] These efforts came from non-partisan groups as well as organizations across the political spectrum. Presidential campaigns, large national organizations, and small local groups—many targeting specific, underrepresented segments of the population—held voter registration drives at locations ranging from churches to senior citizen centers to farmers' markets to school campuses. "Registration groups typically focus their resources on providing assistance to communities that face the greatest barriers to registration and voting." *Id.*

A significant portion of voters have registered through these community-based methods. In 2010, less than half of voters reported that they had registered at their DMV or at a government registration

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[15] *Available at* http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf.

office. U.S. Census Bureau, *Voting and Registration*, Table 12.[16] In the electorate as a whole, 5.7% reported registering at a school, hospital, or on campus, while an additional 5.2% reported using a registration booth. *Id.* Moreover, 13.5% of registrants reported registering by mail. *Id.* Because community-based registration efforts overwhelmingly use mail-in applications, some number of the mail-in registrant group is likely attributable to a voter drive or other community-based voter registration effort.

Among groups with low registration rates, community-based registration methods played an even more important role. Black, Asian, and Hispanic citizens all reported higher than average use of school, hospital, and on campus registration methods (7.7%, 6.7%, and 7.5%, respectively), as well as higher than average use of registration booths (7.2%, 7.0%, and 8.9%, respectively). *Id.* Naturalized citizens also reported greater usage of community-based methods of registration than did native-born citizens. *Id.* And among people ages 18 to 24—the age group for which registration rates are lowest—13.6% of registered voters reported registering at a school, hospital, or on campus. *Id.*

A survey of the 2008 electorate revealed similar trends. Of those who remembered how they registered to vote, 16% reported registering either at a "registration drive" (8%) or at a school, hospital, or on campus (8%). Douglas R. Hess & Jody Herman,

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[16] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

Representational Bias in the 2008 Electorate, PROJECT VOTE, Table 3 (Nov. 2009).[17] An additional 5% reported registering somewhere other than at the Department of Motor Vehicles, a public assistance agency, a registration office, by mail, or on election or primary day. *Id.* Non-Whites were twice as likely as Whites to register at registration drives (12% versus 6%) and also registered at schools, hospitals, or on campus at a much higher rate (11% versus 7%). *Id.*

Federal law favors registration drives, as the federal courts have recognized:

> [T]he NVRA encourages voter-registration drives; the NVRA requires a state to accept voter-registration applications collected at such a drive and mailed in to a voter-registration office; the NVRA gives a voter-registration organization like each of the plaintiffs here a 'legally protected interest' in seeing that this is done; and when a state adopts measures that have the practical effect of preventing an organization from conducting a drive, collecting applications, and mailing them in, the state violates the NVRA.

League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155, 1163 (N.D. Fla. 2012); *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) ("Nowhere does the NVRA prohibit or regulate voter registration drives;

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[17] *Available at* http://www.voterparticipation.org/wp-content/uploads/2011/10/Project_Vote_-_Representational_Bias_the_2008_Electorate.pdf.

rather, it impliedly encourages them."). One court—noting the expressive and associational rights implicated by voter registration activities—applied intermediate scrutiny to efforts to curb them. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700-01 (N.D. Ohio 2006). These decisions acknowledge that community-based voter registration efforts are an important mechanism of enfranchisement, and one that the NVRA itself has enshrined as an indispensable part of the electoral process.

II. PROPOSITION 200 IMPAIRS EFFORTS TO REGISTER VOTERS, ESPECIALLY EFFORTS BY COMMUNITY-BASED REGISTRATION ORGANIZATIONS

Proposition 200 substantially impedes community-based registration efforts because it requires potential new registrants to produce forms of identification—a driver's license, a current U.S. passport, a birth certificate, naturalization documents, or selected Bureau of Indian Affairs and tribal identification documents—that many people do not carry on their persons and that many other people do not possess at all. Those documentation requirements are detailed in Part II.B., *infra*. This section begins in Part II.A., however, by elaborating the severe negative consequences those requirements already have had on efforts to make qualified potential voters full participants in our democratic community. Those consequences are tangible, and they are unacceptable.

A. The Documentation Requirements Of Proposition 200 Have Adversely Affected Community-Based Voter Registration

During the twenty months following the enactment of Proposition 200 in January 2005, at least 31,500 registration applications were denied because of a failure to meet the law's requirements. J.A. 263.[18] That number, although alarmingly high, likely understates the problem because those figures are from the period just before a mid-term election took place, and voter turnout and voter registration rates are much higher during presidential election cycles. U.S. Census Bureau, *Voting and Registration – Historical Time Series*, Table A-1 (2012).[19] Of those 31,500 individuals whose application for registration was initially denied, only approximately 11,000 were later able to register successfully—the remaining 20,000 individuals did not subsequently make it onto the rolls. *See* J.A. 264. The Hispanic population was overrepresented relative to its share of the population both in the group of individuals whose registration applications were initially denied and in the subset of individuals who did not subsequently register successfully. *Id.* at 263-64.

Proposition 200 had an especially pronounced effect on community-based voter registration efforts.

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[18] That figure likely underestimates the number of applications rejected because one of the fifteen counties did not produce any registration forms and a second county provided only a portion of its rejected forms. *See* J.A. 263 n.12.

[19] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html.

After the law went into effect, registration through community-based voter drives dropped 44% in Arizona's largest county. *See* Gonzalez Resps.' Br. 18; (citing Tr. Ex. 966, Record 741, 741); *see also The State of the Right to Vote After the 2012 Election Before the S. Comm. on the Judiciary*, 112th Cong. (Dec. 19, 2012) (statement of Nina Perales, MALDEF Vice President of Litigation).[20] Numerous individuals and groups involved in voter registration drives testified at trial that they encountered difficulty in registering individuals who did not have any of the acceptable forms of documentation or who did not have their documents with them when they attempted to register. Trial Tr. at 559:25-560:4; *see also id.* at 501:14-18; *id.* at 583:6-21; *id.* at 612:11-22. On some occasions, volunteers drove individuals without another means of transportation home to collect their documents or contacted the counties where they were born to try to obtain documentation that would satisfy Proposition 200. *Id.* at 560:17-25; *see also id.* at 501:22-502:1. Some voters who left to retrieve documentation did not return to complete their applications. *Id.* at 561:1-3.

Numerous organizations also testified that because Proposition 200 requires photocopies of certain types of documentation, effective registration requires the group to have a copier or scanner on site. Trial Tr. at 612:2-11. This requirement both restricts the types of locations where drives can be held and increases the cost of conducting such events. Some groups that engage in community-

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[20] *Available at* http://www.judiciary.senate.gov/pdf/12-12-19PeralesTestimony.pdf.

based voter registration in Arizona testified that they "do[] not have the resources to equip canvassers with portable photocopy machines or scanners and printers in order to conduct voter registration campaigns in Arizona." Camarillo Decl., ¶ 12. Others have reported bringing portable photocopiers or scanners and printers to registration drives but noted that generators were necessary to run the equipment. Trial Tr. at 612:25-613:4.

The costs of copying documents are compounded by the additional time—and therefore additional resources—needed to explain registration requirements, assist with filling out forms, track down or copy necessary documentation, and follow-up on applications. The Arizona Advocacy Network, for example, testified that Proposition 200 increased their cost of registering individuals from $7.08-7.81 per voter to $9.28-12.21 per voter, resulting in a total cost increase of $11,000-22,000. J.A. at 278-79. Similarly, Chicanos Por La Causa testified that Proposition 200 increased the expense of their voter registration efforts because of commercial copying costs for registrants' citizenship documents and because of the greater amount of time needed to register each voter. Trial Tr. at 554:15-555:5. Some groups encountered so many difficulties in registering individuals under Proposition 200 that they ceased their voter registration efforts in Arizona following its passage. *See* Prelim. Inj. H'rg Tr. at 122:1-22 (testimony that League of Women Voters of Arizona stopped registering voters because of Proposition 200); *see also* Trial Tr. at 608:17-609:1 (testimony that Project Vote stopped funding the Latino Vote Project in Arizona following the enactment of Propo-

sition 200). The League of Women Voters of Arizona, for example, stopped registering voters both because of the increased cost of registration and because it was unwilling to take responsibility for collecting and storing people's personal documents. *See* Prelim Inj. H'rg Tr. at 123:4-11.

A number of the signatories to this brief engaged in community-based registration efforts in Arizona during the period in which Proposition 200's citizenship documentation requirement was in effect. Their experiences were consistent with the trial evidence discussed above. During the 2012 election cycle, for example, the Border Action Network held registration drives at a variety of community gathering spots, including libraries, a swap meet, and a school. Some people who registered at those events were not planning to register at all, but decided to do so because they encountered the registration drive. Others had been thinking about registering but decided to do so only when they came across the event, because it was convenient there. As a result, many of those who tried to register were not carrying one of the forms of documentation acceptable under Proposition 200. Many of the individuals Border Action Network attempted to assist with registration used the bus as their means of transportation and did not have a driver's license or other form of documentation with them that they could use to register. And even when they did, the registration volunteers did not have a photocopier with them and could not make copies of individuals' documents. When Border Action Network provided registrants with the federal registration form, which does not require documentation of citizenship, it was significantly

easier for individuals to complete and submit their applications.

Rock the Vote conducts voter registration in every state but North Dakota (which does not have a voter registration requirement). It targets young people ages 18 to 29, who are less likely to be registered than older individuals. In Arizona alone, nearly 15,000 Rock the Vote voter registration applications were submitted in 2012. Most of Rock the Vote's registration occurs via the group's online tool, which applicants can access on a computer, a tablet, or a smartphone. That tool asks applicants to answer a series of questions and then uses the answers to automatically populate the federal voter registration form for them. In most states, after completing their forms, the applicants are prompted to print them out, sign them, and mail them in. They are also automatically emailed a reminder to print and mail the form, are sent a second reminder a few days later, and—if they do not appear on the registration roll within two weeks—they are added to a list for follow-up by telephone. In a few states, applicants can choose to submit their forms electronically directly to the state's online voter registration system; Rock the Vote is currently working to expand this electronic submission option to other states, including Arizona. If documentation of citizenship were necessary, then the online registration tool would need to include the additional steps of instructing applicants on how to obtain the necessary documentation, find a photocopier, and make copies of the necessary documents. Based on Rock the Vote's experience, additional documentation requirements would dramatically reduce the effectiveness of its

online registration tool, which targets young individuals who do most things electronically and whose everyday lives do not involve obtaining, printing, or mailing physical documents. If the additional hurdle of locating a photocopier and the required documentation is added to the process, it is less likely that applicants will follow through and complete their registrations.

Other signatories to this brief engage in community-based registration work in other states, but have not undertaken those efforts in states that require documentation of citizenship because of the numerous ways such requirements would reduce the effectiveness of their work. The Fair Share Alliance Education Fund, for example, does voter registration work in several states, including six states in 2012 (Colorado, North Carolina, Pennsylvania, Ohio, Wisconsin, and Florida). It deploys staff with clipboards to high-traffic public areas such as post offices, bus stops, and movie theater lines. It does not hold publicized events or work from tables or booths and cannot photocopy documents while assisting voters to register. Virtually all of the people who have registered through its efforts did not plan in advance to register at that time or location and thus would not have thought to carry the documents required by Proposition 200. And because the group targets its efforts at underrepresented communities and those of lower socioeconomic status, the organization's voter registration drives encounter many individuals who do not have any of the permissible forms of documentation. Moreover, the group would not be willing to take responsibility for collecting personal information such as birth certificates from registrants

for the purpose of copying them, nor does it think that most people would be comfortable turning over those documents. As a result, the Fair Share Alliance and its affiliate Fair Share Alliance Education Fund would be unlikely to begin voter registration work in a state that required documentation of citizenship, and it would likely end its programs in the states it currently works in if they adopted such a requirement.

B. Proposition 200 Requires Documents That Many People Do Not Carry On Their Persons And Indeed May Not Possess At All

As explained, the documentation requirements of Proposition 200 manifestly inhibit effective community-based registration efforts. It is easy enough to see why: Proposition 200 requires potential registrants to produce papers that many people do not carry with them as they conduct their day-to-day affairs—precisely when registration drives seek to reach them—and that many people do not possess at all.

Although many individuals carry their driver's licenses, far fewer keep a birth certificate, passport, naturalization documents, or tribal documentation on their persons on a regular basis. *See, e.g.*, Trial Tr. at 612:11-20 (testimony of life-long community-based voter registration activist and volunteer that she has "never experienced somebody actually having their birth certificate with them" and that, in her experience, potential registrants at community events do not carry their passports with them). Some people keep their birth certificates or pass-

ports in safe deposit boxes, necessitating a trip to the bank during regular business hours. Likewise, students who move for school may leave important paperwork at their parents' homes and be unable to register until they retrieve it. Even if an individual has the necessary documentation on his or her person when approached at a registration drive, he or she may be unwilling to provide a birth certificate or passport to a stranger, given very legitimate concerns that it will be lost or stolen or that identity theft will occur. *See* Pl.'s Ex-Parte Mot. for TRO, Ex. C ("Camarillo Decl."), ¶ 13.

Further compounding the problem is the fact that many citizens do not possess the types of documentation required by Proposition 200. The most common form of documentation is an Arizona driver's license.[21] But approximately 10% of voting-age citizens in Arizona do not possess an Arizona driver's license. J.A. 257. Moreover, many citizens who do have driver's licenses cannot use them to satisfy Proposition 200. Before October 1, 1996, Arizona's Motor Vehicle Department ("MVD") did not require applicants for licenses to provide proof that they were lawfully present in the United States. *See* State of Ariz. Office of the Att'y Gen., Att'y Gen. Op. re: Identification Requirements for Voter Registra-

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[21] Proposition 200 also states that citizenship may be proven by a license issued by a different state, if that license indicates citizenship status on its face. But because no state issues licenses that indicate citizenship status on their faces, Trial Tr. at 733:9-18 (testimony of Arizona's State Election Director), only Arizona licenses may be used in practice.

tion [hereinafter AZ AG Op.], at 3 (2005).[22] Accordingly, licenses issued prior to that date cannot be used to fulfill Proposition 200's documentation requirement. *See* A.R.S. § 16-166(F)(1). Similarly, citizens who obtained their driver's licenses before they were naturalized cannot use their licenses as documentation of citizenship because MVD records reflect citizenship status as of the date the license was issued, unless the licensee requests an updated license by providing their certificate of naturalization to the MVD and paying a fee. J.A. 262. Moreover, naturalized citizens are usually unaware that they need to update their licenses before registering to vote because, while licenses issued to non-citizens are internally coded "Type F" for "foreign" by the MVD, that designation does not appear on the license itself. AZ AG Op. at 3. These issues complicate the efforts of community-based organizations to register voters and lead to many applications being rejected.

The other acceptable forms of documentation under Proposition 200—a current U.S. passport, a birth certificate, naturalization documents, or selected Bureau of Indian Affairs and tribal identification documents—pose additional problems for community-based registration organizations because individuals are less likely to possess them or be able to use them to fulfill Proposition 200's requirements. With regard to U.S. passports, for example, the State Department reports that there were 113,431,943 in circulation in 2012. *See* U.S. Dep't of State, *Passport*

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[22] *Available at* https://www.azag.gov/sites/default/files/sites/all/docs/Opinions/2005/I05-001.pdf.

Statistics.[23] The total citizen population in 2010 was 286,904,283, meaning that only 39% of U.S. citizens (including an undetermined number of non-voting-age children) held passports. U.S. Census Bureau, *Selected Population Profile in the United States, 2009-2011 Am. Cmty. Survey 3-Year Estimates*.[24] Moreover, passport ownership is strongly correlated with both income and education level, meaning that the underrepresented populations targeted by community-based voter registration efforts are less likely to hold valid passports. *See, e.g.*, Richard Florida, *America's Great Passport Divide*, The Atlantic (Mar. 15, 2011).[25]

Birth certificates, though held by more individuals, pose their own problems. Some groups of citizens born outside of hospitals—including people born in rural areas or on Native American reservations—are less likely to have received birth certificates. *See* J.A. 243; *see also* Brennan Center for Justice, *Proof of Citizenship*, 1 (Sept. 2006).[26] Elderly individuals are also unlikely to be able to rely on a birth certificate to satisfy Proposition 200, because birth certificates were not consistently generated until sometime in the 1930s. Corey Dade, *Why New*

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[23] *Available at* http://travel.state.gov/passport/ppi/stats/stats_890.html.

[24] *Available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_S0201&prodType=table.

[25] *Available at* http://www.theatlantic.com/national/archive/2011/03/americas-great-passport-divide/72399/.

[26] *Available at* http://www.brennancenter.org/page/-/d/download_file_38263.pdf.

Photo ID Laws Mean Some Won't Vote, NPR (Jan. 28, 2012).[27] While some people born outside of hospitals before that time received birth certificates from the midwives who delivered them, frequent misspellings of names on those certificates often render them unacceptable for voter registration purposes. *Id.* And even after birth certificates became more common, they were distributed unevenly: one 1950 study found that 20% of Black Americans born in 1939-40 were not issued a birth certificate. S. Shapiro, *Development of Birth Registration and Birth Certificates in the United States*, 4 Population Studies 86, (1950), *cited in* Ira Rosenwaike and Mark E. Hill, *The Accuracy of Age Reporting Among Elderly African Americans: Evidence of a Birth Registration Effect*, 3 (Population Aging Research Center, Univ. of Penna., Working Paper No. 95-04, 1995).[28]

Moreover, birth certificates are frequently unable to satisfy Proposition 200's documentation requirement even for individuals who do possess them—particularly for women. Nationwide, less than half of voting-age women who have ready access to their birth certificates have ones that reflect their current legal names. Brennan Center for Justice, *Citizens Without Proof*, 2 (Nov. 2006).[29] Assuming Arizona is similar to the United States as a whole on that score,

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[27] *Available at* http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote.

[28] *Available at* http://parc.pop.upenn.edu/sites/parc.pop.upenn.edu/files/parc/PARCwps95-04.pdf.

[29] *Available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

more than one and a half million female residents will be unable to use their birth certificates to fulfill Proposition 200's requirements. *See* U.S. Census Bureau, *Age and Sex Composition: 2010*, 7 (May 2011).[30]

Community-based registration organizations also confront serious obstacles in assisting persons who might need to rely on a certificate of naturalization for documentation of their citizenship. Proposition 200 provides two means by which an individual can register to vote using naturalization documents: by providing the number on the certificate of naturalization or by presenting the certificate to a county recorder. A.R.S. § 16-166(F)(4). Where only the number is provided, Proposition 200 forbids the individual from being added to the registration rolls "until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder." *Id.* After procedures to implement Proposition 200 were passed, Arizona realized that the "certificate of naturalization number" it asked applicants to provide could not be used to verify citizenship in the federal database. Accordingly, it amended its procedures to require the provision of the individual's alien registration number, which may also appear on the certificate of naturalization. J.A. 251. But individuals naturalized prior to approximately 1975 do not have an alien registration number on their certificates of naturalization. *Id.* at 251 n.5. Accordingly, they cannot register by mail—which is how many com-

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[30] *Available at* http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

munity-based organizations register voters—and must instead follow the second method of registration for which Proposition 200 provides: presentation of the certificate to the county recorder for inspection, which requires that the individual actually appear at the office in person during business hours.

Unlike birth certificates and passports, for which Proposition 200 specifically states that a photocopy mailed with the registration form is acceptable documentation, *see* A.R.S. § 16-166(F)(2) & (3), the statute does not make any mention of using photocopied certificates of naturalization to prove citizenship. And although some counties in Arizona say that they accept photocopies of naturalization documents, *see* J.A. 290, federal law criminalizes the photocopying of such documents, *see* 18 U.S.C. § 1426(h); *see also* J.A. 299. Accordingly, community-based registration organizations cannot register an individual whose certificate does not contain an alien registration number.

Finally, Proposition 200 permits the use of a "bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number" as documentation of citizenship. A.R.S. § 16-166(F)(6). As the district court explained, however, the Bureau of Indian Affairs and tribal treaty cards are not in use in Arizona. J.A. 260. As a result, the only form of tribal documentation available to satisfy Proposition 200 is a tribal enrollment number. But at least two tribes in Arizona (the Navajo Nation and the Havasupai Tribe) do not issue tribal enrollment cards at all, and several others (the Hopi Tribe, the Yavapai-Apache Nation, and the Tonto Apache Tribe) do not have en-

rollment numbers on their tribal enrollment cards and thus members cannot use them as documentation of citizenship. *Id.* There were 292,552 Native Americans living in Arizona in 2005, *see* Ariz. Dep't of Health Services, *Demographics and Effective Risk Communication, Research Report*, 17 (Apr. 2005),[31] and of them, 167,183 individuals—57% of Arizona's Native American population—belonged to one of the five tribes that do not issue documentation sufficient to comply with Proposition 200.[32] And because many Native Americans also lack drivers licenses and birth certificates, *see* Trial Tr. at 187:19-188:18; 472:5-21, community-based organizations that focus on Native American voter registration are particularly impeded by Proposition 200.

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In sum, Proposition 200 makes community-based registration less effective and more costly for groups

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[31] *Available at* http://www.azdhs.gov/phs/edc/edrp/es/pdf/adhsspecialpopstudy.pdf.

[32] There were 152,159 members of the Navajo Nation, 679 members of the Havasupai Tribe, 12,213 members of the Hopi Tribe, 2,007 members of the Yavapai-Apache Nation, and 125 members of the Tonto Apache Tribe enrolled in Arizona in 2005. *See* U.S. Dep't of the Interior, Bureau of Indian Affairs, *2005 American Indian Population and Labor Force Report*, 10, 18, *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf.

The 2005 figures are the most recent available; due to "methodology inconsistencies," the Bureau of Indian Affairs did not release its 2010 Indian Population and Labor Force Report. *See* Letter of Donald E. Laverdure, Acting Assistant Secretary – Indian Affairs (Jul. 2, 2012), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-019173.pdf.

engaged in those efforts. Many eligible individuals cannot be registered through community-based registration drives, either because they do not have any acceptable form of documentation or because they do not have the documentation with them when approached at a registration drive. In the latter situation, some individuals need assistance to retrieve or copy their documents, while others leave to retrieve them and fail to return. Thus, Proposition 200 greatly increases the burdens on community-based registration organizations, from the additional time needed to assist each applicant to the cost of photocopying documents (either commercially or by bringing a generator and portable printer to a registration drive) while also substantially reducing the number of eligible voters who can be reached through registration drives conducted by such organizations.

CONCLUSION

For the foregoing reasons and those stated in respondents' briefs, the judgment below should be affirmed.

Respectfully submitted,

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v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., AND JESUS M. GONZALEZ, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

The following scholars are experts in the field of constitutional law, each of whom has published an article on the Elections Clause or the scope of federal preemption of state law.[2] *Amici curiae* appear to ensure appropriate application of text, structure, history, and meaning of the Elections Clause:

Gabriel J. Chin is a Professor of Law at University of California Davis School of Law. His scholarship includes the areas of constitutional law, federal preemption, civil rights and racial equality issues.

Jack N. Rakove is the William Robertson Coe Professor of History and American Studies, and Professor of Political Science and (by courtesy) Law, at Stanford University. He is the author of six books, including ORIGINAL MEANINGS: POLITICS AND IDEAS IN

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

[2] Affiliations listed are for identification purposes only.

THE MAKING OF THE CONSTITUTION, which won the Pulitzer Prize in History.

Jamelle Sharpe is an Associate Professor and the Richard W. and Marie L. Corman Scholar at the University of Illinois College of Law. His scholarship includes federal court jurisdiction and federal preemption of state law.

Franita Tolson is the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her scholarship includes elections and federalism.

INTRODUCTION AND SUMMARY OF ARGUMENT

In writing the Elections Clause more than two centuries ago, our Constitution's Framers concluded that the federal government must have the final say over the mechanics of federal elections, including the rules applicable to voter registration. In lengthy, comprehensive debates – beginning at the Constitutional Convention in Philadelphia, continuing in the State Ratification Conventions, and through the debates over the Amendments to the Constitution proposed in 1789 – the people who wrote and ratified the Constitution made clear that they conferred on Congress the power to "make or alter" state election law in order to protect voting rights in federal elections and allow Congress to set uniform rules for the time, place, and manner of those elections. Where Congress invokes its power to "make or alter" state law, federal law expressly preempts state time, place, and manner regulation,

ensuring that states do not interfere with the people's right to vote for their federal representatives. Unlike other contexts in which federal preemption under the Supremacy Clause might be more difficult to discern, the text of the Election Clause, and its original meaning, are unambiguous when it comes to the Clause's preemptive power.

Arizona contends that the National Voter Registration Act's ("NVRA") requirement that Arizona "accept and use" the Federal Form for mail-in voter registration for federal elections exceeds the scope of Congress' power to regulate federal elections. Az. Br. at 46-53. Arizona's claim cannot be squared with the text and history of the Elections Clause, which give Congress the express power to "make or alter" state election law to correct abuses of state power and ensure that the American people have the right to freely select federal representatives of their choice without interference from the states.

In enacting the NVRA, Congress acted for the very reasons at the core of the text and history of the Elections Clause, using its express power to "make or alter" state law in order to protect the right to vote and ensure a uniform method of voter registration across all fifty states. As the text of the NVRA reflects, Congress chose to "alter" state-law requirements such as Arizona's, requiring all states to "accept and use" the Federal Form for mail-in registration. As Respondents have demonstrated Arizona's Proposition 200 conflicts with the plain terms of the NVRA and must be invalidated. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

ARGUMENT

THE TEXT AND HISTORY OF THE ELECTIONS CLAUSE GIVE CONGRESS BROAD POWER TO OVERRIDE STATE LAW IN ORDER TO PROTECT THE RIGHT TO VOTE IN FEDERAL ELECTIONS.

A. The Elections Clause Is Unique in Its Breadth, Structure, and the Power It Grants to Congress.

In designing our federal system, the Framers of our Constitution "split the atom of sovereignty," creating "two orders of governments, each with its own direct relationship, its own privity, its own set of mutual rights and obligations, to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Creating a national government that represents and "owes its existence to the act of the whole people who created it," the Constitution established "a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 839, 845 (Kennedy, J., concurring). In setting forth the respective powers of federal and state government to

regulate federal elections in the Elections Clause, the Framers gave paramount power to Congress, recognizing that "the National Government . . . must be controlled by the people without collateral interference by the States." *Id.* at 841 (Kennedy, J., concurring).

The Elections Clause provides that:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST., Art. I, §4, cl.1.

The plain text of the Elections Clause confers on states the power to regulate elections for federal representatives – a power they did not have prior to the Constitution – and then gives to the federal government the power to "make or alter" resulting state laws.[3] Where Congress invokes its express power to "make or alter" state law, Congress' chosen regulations supersede and override those of the several states. Indeed, the very point of

---

[3] There are indisputably other constitutional sources giving Congress a special role with respect to the regulation of elections. *See* U.S. CONST. Amends., XIV, XV, XIX, XX, XXIII, XXIV, XXVI.

congressional action under the Elections Clause is to displace the acts or omissions of the states.

The plain language of "make or alter" confers upon Congress the authority both to originate federal law and supersede state laws regulating federal elections. In Samuel Johnson's 1768 *Dictionary of the English Language*, among the top definitions of "make" is "to create," "to form" or "to produce." "[A]lter" is defined as "to change," "to make otherwise than it is." *See* SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1768). Other dictionaries of the Founding-era were to the same effect. *See* THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780). In writing the Elections Clause, the Framers thus intended for Congress to possess the authority both to *create* new federal law and *change* existing state law governing federal elections. Where Congress acts under the Elections Clause, it expressly preempts state regulation of the time, place, and manner of federal elections.

This broad power both to "make" new federal law and "alter" existing state law is made even more apparent when compared to language elsewhere in the Constitution. While many of the provisions of Article One give Congress the power to regulate both private individuals and the several States, *see, e.g.*, U.S. CONST., Art. I, §8 (giving to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."), only the Elections Clause "express[ly] delegat[es] . . . power to the States," and then establishes a "safeguard against state abuse by giving Congress the power to 'by Law make or alter

such Regulations.'" *Term Limits*, 514 U.S. at 805, 808. *See* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 62 (Jonathan Elliot ed. 1836) ("[I]n the first part of the clause, th[e] power over elections is given to the states, and in the latter part the same power is given to Congress.") (N.C.). Structurally, the raison d'etre of congressional action under the Elections Clause is to "enable[] Congress to alter such regulations as the states shall have made with respect to elections." *Id.* at 68.

Both in its language and its structure, the Elections Clause is unique in giving to Congress the express power to "make or alter" state law, a power that the Framers did not give to Congress generally. *E.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27-28 (Max Farrand ed. 1911) (rejecting proposal to give Congress a blanket federal "negative" on state laws). "The text of the Constitution unquestionably reveals the Framers' distrust of the States regarding elections," *Term Limits*, 514 U.S. at 811 n.21, and demonstrates the Framers' deliberate intent to establish Congress's important and supreme role in the area of federal elections – elections in which voters "act in a federal capacity and exercise a federal right." *Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring).

The Framers did not grant Congress this broad "make or alter" authority lightly, but viewed federal election regulation as a matter worthy of explicit exception. "The importance of elections was a recurrent theme during the Convention, so Congress's ability to veto state electoral regulations

was widely seen as necessary to prevent the states from destroying the national government without intruding on state sovereignty in the same way that a general negative over state law would have." Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1223-24 (2012).

By the very nature of the Clause's text and structure, when Congress acts pursuant to the Elections Clause, it expressly supersedes state law. This preemptive force has been amply recognized by this Court. *See Ex Parte Siebold*, 100 U.S. 371, 384 (1879) ("[T]he power of Congress over the subject [of federal elections] is paramount. . . . When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or *alter*.'") (emphasis in original); *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) ("Congress may supplement . . . state regulations or may substitute its own. It may impose additional penalties . . . or provide independent sanctions. It 'has a general supervisory power over the whole subject.'") (quoting *Siebold*, 100 U.S. at 387).

At the Founding, the breadth of Congress' express power to "make or alter" state regulation of federal elections was understood by supporters and detractors alike. The plain text of the Elections Clause, as James Madison explained at the Constitutional Convention, uses "words of great latitude," recognizing that "it was impossible to foresee all the abuses that might be made of the [states'] discretionary power." 2 RECORDS OF THE

FEDERAL CONVENTION OF 1787 at 240. As Madison explained, "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet in one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures and might materially affect the appointments." *Id.* at 240-41; *see also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 535 (Pa.) Thus, the Framers' understanding was that Congress would have final say over questions of balloting, location of polling places, districting, and other of "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Opponents of the Elections Clause, too, understood that the Clause gave Congress strong powers to regulate federal elections, explaining that their "great difficulty" was that "the power given by the 4th section was unlimited." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 25 (Mass.), and "admits of the most dangerous latitude." 3 *id.* at 175 (Va.); *see also* 4 *id.* at 55 ("[T]hey are words of very great extent. This clause provides that a Congress may at any time alter such regulations, except as to the places of choosing senators.") (N.C.).

In the ensuing debates over ratification of the Constitution, the Elections Clause was vigorously challenged, with Anti-federalists arguing that the Elections Clause "strike[s] at the state legislatures, and . . . take[s] away that power of elections which

reason dictates they ought to have among themselves." 4 *id.* at 51 (N.C.). In their view, "Congress ought not to have the power to control elections." 2 *id.* at 23 (Mass.).

Pressed to persuade their fellow Americans that the Elections Clause was an appropriate aspect of federal power properly included in the Constitution, the new Constitution's supporters justified the necessity of this power in order to protect voting rights in federal elections from state infringement and to promote appropriate uniformity in election administration. These arguments carried the day, establishing the constitutional framework for federal regulation of federal elections that still governs more than two centuries later.

B. The Elections Clause Was Written to Give Congress Power to Protect Voting Rights In Federal Elections From State Infringement.

The text and history of the Elections Clause give the federal government "final say," *Foster v. Love*, 522 U.S. 67, 72 (1997), over the broad mechanics of federal elections, rejecting the "idea of state interference with the most basic relation between the National government and its citizens, the selection of legislative representatives." *Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring). The Framers of the Elections Clause recognized that strong federal powers were needed to empower Congress to "intervene against acts of injustice within the states," JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE

CONSTITUTION 224 (1997), and ensure that states did not deny or abridge the right to vote in the federal elections guaranteed by the Constitution. *See* FEDERALIST NO. 57 ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.") (Madison).

During the debates over the Elections Clause at the Constitutional Convention, James Madison explained that the grant of strong federal power to protect the right to vote in federal elections was necessary because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 RECORDS OF THE FEDERAL CONVENTION at 240. Madison explained that "the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections." *Id.* To prevent abuses by the states, Madison argued in favor of giving "a controuling power to the Natl. legislature." *Id.* at 241.

Madison was particularly concerned that states would use their power to regulate elections to skew the outcomes of federal elections. "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 RECORDS OF THE FEDERAL CONVENTION at 241. Along similar lines, Gouverneur Morris observed that "the States might make false returns and then

make no provisions for new elections." *Id.*; *see also* FEDERALIST NO. 59 (arguing that, without the Elections Clause, states "could at any moment annihilate [the Union] by neglecting to provide for the choice of persons to administer its affairs") (Hamilton). By the close of debate at the Convention, the overwhelming consensus was that the Constitution should "give the Natl. legislature a power . . . to alter the provisions of the States, but [also] to make regulations in case the States should fail or refuse altogether." 2 RECORDS OF THE FEDERAL CONVENTION at 242.

In the ensuing debates over ratification of the Constitution in the states, the Constitution's supporters justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people right's to equal voting power." PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 210 (2010).

For example, in the Virginia ratifying convention, James Madison stressed the importance of the federal role in securing equal voting rights. "Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS at 367. Other delegates to the Virginia convention worried that states would simply not hold elections for federal office, preventing the popular vote demanded by the Constitution. *Id.* at

10 ("If the state legislature . . . would not appoint a place for holding elections, then there might be no election . . . ."). These abuses "could only be guarded against by giving this discretionary power to Congress of altering the time, place, and manner of holding the elections." *Id.*

Likewise, in the Massachusetts Convention, Federalists argued that the Elections Clause was necessary both for "preserving the union" and "securing to the people their equal rights of election." 2 *id.* at 26. They also recognized that public political participation was at stake, because "when faction and party spirit run high," states might "introduce such regulations as would render the rights of people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors." *Id.* at 27. Supporters of the Elections Clause pointed to "inconsiderable" public participation in state elections and town meetings to argue that "Congress ought to have an interposing power to awaken the people when thus negligent" or "apt to neglect this right [to vote]." *Id.* at 24.

The Constitution's supporters recognized that "[w]ithout these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, . . . who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.* at 27; *see also id.* at 25-26 (arguing that the Elections Clause was "as highly

prized as any [section] in the Constitution" because "the *right* of electing persons to represent the *people* in the federal government" is "an important and sacred right") (emphasis in original); *id.* at 32 (arguing that in the event "the state legislature could not appoint electors," a "power to provide for such elections" was "necessary to be lodged in the general Congress"); *id.* at 51 (arguing that, because of inequality of representation in South Carolina, "representatives . . . from that state, will not be chosen *by the people*, but will be the representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?").[4]

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[4] Similar arguments in favor of federal power over federal elections were made in other states conventions as well. *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 441 (arguing that, in the event a state legislature should order a state-wide election to be held in one city, "ought not the general government to have the power to alter such improper election of one of its own constituents parts?") (Pa.); 4 *id.* at 53-54 (recognizing need for an "ultimate power in Congress" in case "a few powerful states should combine and make regulations concerning elections which might deprive many of the electors of a fair exercise of their rights") (N.C.); *id.* at 303 ("Congress should have this superintending power, lest, by the intrigues of a ruling faction . . ., the members of the House of Representatives should not really represent the people of the state . . . .") (S.C.).

In the First Congress, the Framers, once again, affirmed the need for strong federal power to protect the right to vote in federal elections from denial or abridgement by the states. During debates over proposed Amendments to the Constitution, the Framers rejected a proposed Amendment to the Elections Clause, which would have eliminated the power of Congress to protect the right to vote in federal elections. Reaffirming the importance of congressional power over federal elections, the Framers defeated a proposed Amendment that would have forbidden Congress from regulating federal elections except when a "State shall refuse or neglect, or be unable . . . to make such election." Annals of Congress, 1st Cong., 1st Sess. 797 (1789).

In the debate that ensued, James Madison argued that "the constitution stands very well as it is" and that the proposed amendment would "tend to destroy the principles and efficacy of the constitution." *Id.* at 798, 800. Others affirmed that the power to regulate federal elections was "one of the most justifiable of all the powers of Congress; it was essential to a body representing the whole community, that they should have the power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations . . . ." *Id.* at 797.

This Court has confirmed what the text and history make clear: the Constitution provides for broad congressional power to regulate federal elections in order to create a "safeguard against state abuse." *Term Limits*, 514 U.S. at 808-09; *see also Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004)

(plurality opinion); *Oregon v. Mitchell*, 400 U.S. 112, 119-24 (1970) (opinion of Black, J.). *See* Gonzalez Resp. Br. at 44-48; Inter Tribal Council Resp. Br. at 30-34, 48-50.

C. The Elections Clause Was Written to Give Congress Power to Promote Uniformity in Election Administration.

The text and history of the Elections Clause also demonstrates the power of Congress to establish "uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69. Rejecting the argument that the Elections Clause impinged on the proper role of state governments in our federalist system, James Madison and others repeatedly made the point that the text had been framed to give Congress a "superintending power," 4 DEBATES IN THE SEVERAL STATE CONVENTIONS at 303 (S.C.), to alter state rules that improperly threatened the federal interest in a uniform system of federal elections.

From New York to North Carolina, supporters of the Elections Clause argued for Congress' ability to provide for uniformity in election administration. The concerns were practical, recognizing that wild diversity in administration would stifle the people's will, *see, e.g.*, 2 *id.* at 326 (N.Y.), open the door to the deprivations of rights, *see, e.g.*, *id.* at 535) (Pa.), and cause inconvenience, *see, e.g.*, 4 *id.* at 60 (N.C.), and delay, *see, e.g.*, 3 *id.* at 10-11 (Va.).

At the New York ratifying convention, for example, Governor Clinton argued that "Congress . . . was to speak the will of the people, and that will was law, and must be uniform." 2 *id.* at 326 (N.Y.). In Pennsylvania, supporters of the Elections Clause advocated that the time, place, and manner of regulations ought to be uniform "to prevent corruption and influence," 2 *id.* at 535 (Pa.), as well as to "ensure to the *people* their rights of election and establish a uniformity in the mode of constituting the members of the Senate and House of Representatives." Letter from Timothy Pickering, Delegate, Pennsylvania Ratifying Convention, to Charles Tillinghast, Dec. 24, 1787, quoted in 2 LIFE OF TIMOTHY PICKERING 357 (1873) (emphasis in original).

Uniformity was also identified as a matter of "greatest consequence" in North Carolina, where supporters insisted that election regulations "ought . . . not to be different in one state from what they are in another" because it would be "more convenient to have the manner uniform in all states." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS at 60. And at the Virginia ratifying convention, James Madison argued that "the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent." 3 *id.* at 367; *see also id.* at 11 (noting that "the power of Congress to make the times of elections uniform in all the states, will destroy the continuance of any cabal").

In enacting the NVRA, Congress acted squarely within its constitutionally granted authority to "make or alter" laws related to federal elections.

As explained in the briefs of the Respondents, *see* Gonzalez Resp. Br. at 7-8, 11-12, 42-44, 55; Inter Tribal Council Resp. Br. at 3-8, 40-42, the NVRA furthers the goals of voter protection and uniform administration at the heart of the Elections Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, *ET AL.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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No. 12-71

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THE STATE OF ARIZONA, *ET AL.*,

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THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both state and federal power. In the context of the integrity of the elections on which the Nation has based its political

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

community, Eagle Forum has supported efforts both to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Various plaintiffs (collectively, "Plaintiffs") sue the State of Arizona, Arizona's counties, and state and county officials (collectively, "Arizona") to enjoin the requirement of Arizona's Proposition 200 that those seeking to register to vote provide proof of U.S. citizenship in order to register. Plaintiffs contend that Arizona's effort to enforce the most basic prerequisite to the right to vote conflicts with the National Voter Registration Act ("NVRA"). Arizona argues that the NVRA does not preclude Proposition 200 and that, in any event, Congress lacks authority to set voter-qualification standards, which the Voter-Qualifications Clause entrusts to the several states.

This litigation thus raises three fundamental issues in our democracy: (1) the fundamental right of citizens both to vote and to avoid dilution of their votes by non-citizens who fraudulently or mistakenly register to vote; (2) the division of power between the states and Congress on the fundamental issue of voter qualifications; and (3) the preemption analysis that federal courts use to weigh the divisions between the states and Congress in our federalist system of dual sovereignty. This Court resolved the first issue when this litigation reached this Court in an interlocutory appeal in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). This appeal on the merits now presents the second and third issues.

Before assessing the appropriate state-federal balance under the relevant constitutional provisions involved here, however, *amicus* Eagle Forum first takes an analytical step back to consider how our Nation got here. As explained below, "here" involves numerous, demonstrated *non-citizens* registered to vote. Voting is the most fundamental element of our citizenship, and it defines our political community and nationhood. In enacting the NVRA, Congress laudably sought to expand voter registration among eligible citizens. But nothing in the NVRA prohibits states like Arizona from using reasonable, proactive additional measures when faced with non-citizen registration. Apart from whether Congress would have the authority to preempt Arizona's actions and how this Court must balance deference to federal agencies under separation of powers versus deference to the states under federalism, Congress could not plausibly have intended to prevent sovereign states from ensuring that only citizens register to vote.

Election Fraud from Non-Citizen Voters

In *Purcell*, this Court vacated a preliminary injunction against Proposition 200, finding that Arizona "indisputably has a compelling interest in preserving the integrity of its election process." 549 U.S. at 4 (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). "[T]he political franchise of voting ... is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Non-citizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the

democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4.

Voter fraud "'debase[s] or dilute[es] ... the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (*quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (states have an interest in preventing voter fraud and ensuring voter confidence). While "even rational restrictions on the right to vote [can be] invidious if they are *unrelated to voter qualifications*, *Crawford*, 553 U.S. at 189 (emphasis added), Proposition 200 addresses the single-most fundamental voter qualification of all: citizenship. *Reynolds*, 377 U.S. at 554-55 (collecting cases). Surely the Congress that passed the NVRA did not intend to facilitate non-citizen registration.

Divided Federal-State Power over Elections

Since the Founding, the Constitution's Elector-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each state. U.S. CONST. art. I, §2, cl. 2.[2] In addition, the Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2. The question presented here is

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[2] The Seventeenth Amendment extended this same requirement to voter qualifications for elections for Senators. U.S. CONST. amend. XVII, cl. 2.

whether the power of Congress to supersede the states on the time, place, and manner of elections includes the power to supersede the states on the qualifications to register to vote.

Preemption Analysis for Federal-State Conflict

Our Constitution establishes a federalist structure of dual state-federal sovereignty. *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990). Under the Supremacy Clause, of course, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof[,] ... shall be the supreme law of the land ..., anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. But federalism's central tenet permits and encourages state and local government authority:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Thus, state governments retain their roles under the Constitution as separate sovereigns.

Accordingly, under this Court's preemption analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth*, 555 U.S. at 565; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

STATEMENT OF FACTS

Neither the legislative facts nor the adjudicative facts are materially in dispute. This litigation is therefore appropriate for summary judgment.

In 1993, Congress enacted the NVRA to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(a), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3). Although the NVRA also addresses registering in person and

registering in conjunction with applying for a driver's license, 42 U.S.C. §§1973gg-2(a), 1973gg-3, 1973gg-5, this litigation concerns only NVRA's provisions for registration by mail. 42 U.S.C. §§1973gg-2(a)(2), 1973gg-4.

With respect to registration by mail, the NVRA directs the Election Assistance Commission ("EAC") to adopt a mail voter registration application form ("Federal Form"), 42 U.S.C. §1973gg-7(a)(2), which the states "shall accept and use." 42 U.S.C. §1973gg-4(a)(1). In addition, however, the states also may develop their own forms that meet the criteria of §1973gg-7(b). Chief among those criteria is the criterion that the form "may require only such identifying information ... and other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1).

In November 2004, the people of Arizona passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, which requires *inter alia* that applicants seeking to register to vote provide proof of U.S. citizenship. ARIZ. REV. STAT. §16-166(F). Because Arizona is a "covered jurisdiction" for purposes of the federal Voting Rights Act, 42 U.S.C. §§1973-1973q, Arizona sought and received preclearance from the Department of Justice before Proposition 200 could take effect. *See Purcell*, 549 U.S. at 2-3.

The registration of non-citizens under the NVRA is a significant problem. Pet. at 8; Arizona Br. at 15-16. For example, in 2005, jury commissions in two

counties alone identified approximately 200 non-citizens registered to vote. Arizona Br. at 16. While polemical opponents of states' ballot-integrity efforts complain that such efforts seek to solve a problem that does not exist, the problem is real here.[3]

The Federal Form requires applicants to attest to their eligibility to register, but does not require proof of an applicant's attestation. Given the prevalence of non-citizen registration in Arizona, *see* Arizona Br. at 16, further proof plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration" under the terms of 42 U.S.C. §1973gg-7(b)(1).

SUMMARY OF ARGUMENT

The Ninth Circuit's heightened deference to ambiguous federal legislation in an area of traditional state regulation conflicts not only with general preemption doctrines and federalism, Section I.A, *infra*, but also with at least two Elections Clause decisions of this Court: *Ex parte Siebold*, 100 U.S. 371, 393 (1880), and *U.S. v. Bathgate*, 246 U.S. 220, 225 (1918). *See* Section I.C *infra*. Moreover, whatever formality this Court attributes to EAC's actions interpreting the NVRA, this Court should not defer to that interpretation because the interpretation fails to apply the presumption against preemption, which renders the interpretation unreliable. *See* Section I.B *infra*. Instead, applying traditional preemption

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[3] In *Purcell*, this Court noted that "the facts in these cases are hotly contested" and thus did not resolve any fact-based issues other than the Ninth Circuit's lack of an adequate basis for issuing a preliminary injunction. 549 U.S. at 5-6.

analysis under the Supremacy Clause requires reversal because there is no actual conflict and the NVRA can be interpreted to allow Proposition 200. *See* Section I.D *infra*. Finally, although this Court could rely on the doctrine of constitutional avoidance simply to reject Plaintiffs' interpretation of the NVRA, this Court should reject the argument that the purely procedural powers of Congress under the Elections Clause displace the substantive powers of the states under the Elector-Qualifications Clause. *See* Section II, *infra*.

ARGUMENT

I. THE NVRA WOULD NOT PREEMPT ARIZONA, ASSUMING *ARGUENDO* THAT CONGRESS HAD THE AUTHORITY TO DO SO

As explained in Section II, *infra*, Congress lacks the authority to preempt Proposition 200. As Arizona notes (Arizona Br. at 46-47), however, this Court may not need to reach that issue if, under the doctrine of constitutional avoidance, this Court determines that the NVRA would not preempt Proposition 200, even assuming that Congress had the authority to do so. In any event, the Ninth Circuit's heightened deference to federal regulation is altogether foreign to this Court's preemption analysis, which defers to the states to avoid assuming that Congress cavalierly would override the laws of another sovereign.

A. Federal Courts Review Preemption Claims Deferentially to States in Areas of Traditional State Concern and Regulation

Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. If preemption analysis becomes "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that analysis will "undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted). To avoid replacing the states' autonomy on issues of state concern with federal commands or democratic legislative action with court injunctions, this Court should reaffirm the principles that underlie its traditional preemption analysis by requiring clear and manifest preemptive intent from Congress and reviewing preemption claims with a presumption against preemption.

As this Court has held, federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995) (*citing Maryland v. Louisiana*, 451 U.S. 725 (1981)). Of course, "never" means *never*, not "in all cases except ones under the Elections Clause."

Indeed, the Ninth Circuit's adoption of a special standard for preemption cases under the Elections

Clause seems particularly misplaced here. While any applicable provisions of the Constitution plainly could limit the states' power to set elector qualifications, this Court has never applied *elevated* preferences to the other potential limits:

> [O]f course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, *or any other provision of the Constitution.*

Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (emphasis added); *see also Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-53 (1959).

Amicus Eagle Forum respectfully submits that the Supremacy Clause – not the Elections Clause – could provide the constitutional basis on which Plaintiffs here seek to rely to void Proposition 200. In other words, Plaintiffs ask whether Proposition 200 conflicts with the NVRA, not whether it conflicts with the Elections Clause. Significantly, the NVRA predated Proposition 200 by ten years and does not – and temporally could not – purport to "make or alter" Proposition 200. *See* U.S. CONST. art. I, §4, cl. 2. Because the Supremacy Clause provides the basis for Plaintiffs' federal claims, that Clause should dictate the standard of preemption analysis. *See* Section I.D, *infra* (applying this Court's traditional preemption doctrines to Proposition 200 and the NVRA).

B. This Court Should Not Defer to the Executive Branch's Administrative Construction of the NVRA

As Arizona explains, the federal administrative construction on which the Ninth Circuit relied falls

short of the traditional basis for agency action to have the force of law. Arizona Br. at 45-46. At the outset, it does not matter what Congress and federal agencies believe about the Constitution: the "power to interpret the Constitution ... remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). Thus, whether the EAC action would qualify for *Chevron* deference or only the lesser *Skidmore* deference[4] is entirely beside the point. With *Chevron*, this Court can decide the issue using traditional tools of statutory construction, which obviates deference to agency constructions altogether. With *Skidmore*, the agency's views lack the power to persuade for the same reason.

If the Court applies the Supremacy Clause's familiar standards, then this Court must reject preemption if the federal statute supports a no-preemption interpretation under the presumption against preemption combined with *Chevron* prong one. *Chevron*, 467 U.S. at 842-43. It does not matter what EAC believes, regardless of how formally that agency expresses its view. If traditional tools of

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[4] Under the former, courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration (*Chevron* prong two), unless the Court can interpret the statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842-44, 865-66 (1984). Under the latter, courts defer to agency interpretation based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

statutory construction – *e.g.*, the presumption against preemption – resolve the matter, deference has no part to play.

In a 2007 dissent joined by the Chief Justice and Justice Scalia and not disputed by the majority, Justice Stevens called into question the entire enterprise of administrative preemption when it conflicts with the presumption against preemption. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law, which is more preemptive than federal law generally. *Watters*, 550 U.S at 12 (majority). At the least, the presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns.[5]

C. The Ninth Circuit's Heightened Test for Preemption under the Elections Clause Conflicts with Precedents of this Court

As indicated in the prior sections, this Court's general preemption jurisprudence should have guided the Ninth Circuit to a different conclusion,

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[5] The courts of appeal have adopted a similar approach. *See, e.g., National Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review ... under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999).

assuming *arguendo* that this Court had not already reached the precise issue of preemption under the Elections Clause. But the Ninth Circuit's heightened test for preemption under the Elections Clause conflicts with both *Siebold* and *Bathgate*. Both of those decisions argue for rejecting the Ninth Circuit's unprecedented creation of a heightened test for preemption in this area of traditional state concern.

In both *Siebold* and *Bathgate*, this Court applied traditional preemption analysis, requiring a clear federal statement and presuming that the federal government acted with deference to state laws. In *Siebold*, 100 U.S. at 393, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with state laws." Similarly, in *Bathgate*, 246 U.S. at 225-26, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting state authority over elections and "consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." Both of these decisions negate a heightened form of preemption analysis like the one adopted by the Ninth Circuit here.

More recently, in *Branch v. Smith*, 538 U.S. 254 (2003), Justices Breyer and Souter joined Justice Stevens' partial concurrence, indicating that Congress must "clearly express[] its intent to repeal or to pre-empt" and weighing the presumption against preemption under the Elections Clause. *Id.* at 285 (Stevens, J., concurring in part and

concurring in the judgment). Justice Thomas joined Justice O'Connor's partial dissent, indicating that the general rules of preemption and commandeering jurisprudence apply to the Elections Clause, just as they apply under the Commerce Clause and any other congressional power. *Id.* at 301-02 (O'Connor, J., concurring in part and dissenting in part). The plurality did not dispute these views so much as find them inapposite to the plurality's position.

D. Under this Court's Traditional Preemption Analysis, Arizona Must Prevail

Where a state's laws actually conflict with an act of Congress properly issued under the Elections Clause, the state law is preempted. *McPherson v. Blacker*, 146 U.S. 1, 40-41 (1892) ("[i]n this respect it is in conflict with the act of congress, and must necessarily give way"). As Chief Judge Kozinski explained, however, the NVRA's application here is susceptible to both Arizona's and Plaintiffs' interpretations. Pet. App. 89c. Arizona is perfectly capable of "accepting and using" the Federal Form without deeming it dispositive on the issue of U.S. citizenship. 42 U.S.C. §1973gg-4(a)(1). Moreover, given the demonstrated instances of non-citizens registering to vote, the additional proof that Arizona requires plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1). By its express terms, the NVRA allows an interpretation that supports Arizona here.

Under the traditional preemption analysis, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group*, 555 U.S. at 77 (*quoting Bates*, 544 U.S. at 449). Indeed, because voter qualifications are an area of traditional state concern and regulation, U.S. CONST. art. I, §2, cl. 2, the presumption against preemption applies even more strongly here. *Wyeth*, 555 U.S. at 565. Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic*, 518 U.S. at 485. All inferences support Arizona.

Of course, *if* the Elections Clause applies to limit the Elector-Qualifications Clause, *but see* Section II, *infra*, Congress would retain the power to correct any perceived error that would result from this Court's deference to the states. If federalism requires deference to the states as distinct sovereigns – as it would under traditional preemption doctrines – then Arizona must prevail.

II. THE NVRA DOES NOT PREEMPT REQUIRING PROOF OF CITIZENSHIP IN ORDER TO REGISTER TO VOTE

The unmodified power of the states to set elector qualifications in one section of Article I is in no way subject to the limited power of Congress to regulate the "time, place, and manner" of elections in a different section of Article I. *Compare* U.S. CONST. art. I, §2, cl. 2 *with id.* art. I, §4, cl. 2. As Justice Harlan explained in his partial dissent for four justices, "[i]t is difficult to see how words could be

clearer in stating what Congress can control and what it cannot control" and "nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part). If the Court finds that the NVRA preempts Proposition 200, then the Court must ask whether Congress had the authority to enact the NVRA in the first place.

Significantly, *Oregon* does not resolve the issue. In *Oregon*, a deeply divided Court held that the right of the states to set electors' qualifications for federal elections was subject to the power of Congress to lower the voting age from 21 to 18. While the lead decision for a single justice found authority under the Elections Clause, *Oregon*, 400 U.S. at 119 ("responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations") (opinion of Black, J.), that view did not command the votes of a majority of justices. *See id.* at 400 U.S. at 229-281 (relying on Equal Protection Clause) (joint opinion of Brennan, White, and Marshall, J.J.); *id.* at 135-44 (relying on Equal Protection Clause and rejecting Elections Clause) (opinion of Douglas, J.); *id.* at 210 (rejecting congressional authority under the Elections Clause) (Harlan, J., concurring in part and dissenting in part). Five justices rejected the Elections-Clause rationale, and three were silent on it.

Writing for himself on the Elections-Clause issue, Justice Black quoted *U.S. v. Classic*, 313 U.S.

299, 315 (1941), for the proposition that the Elections Clause and the Necessary and Proper Clause trumped the states' powers under the Elector-Qualifications Clause:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states ... this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Oregon, 400 U.S. at 121 (*quoting Classic*, 313 U.S. at 315, alteration in *Oregon*) (opinion of Black, J.). Justice Black then quoted *Smiley v. Holm*, 285 U.S. 355 (1932), for the proposition that congressional authority over the "times, places and manner of holding elections for senators and representatives ... embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to ... registration" among the "numerous requirements as to procedure and safeguards ... necessary ... to enforce the fundamental right involved." *Id.* at 122 (*quoting Smiley*, 285 U.S. at 366). While both *Classic* and *Smiley* discuss congressional authority generally, neither decision actually addresses the issue of

whether congressional authority under Article I, Section 4 overrides the states' elector-qualification authority under Article I, Section 2. As such, their application here is *dicta*. *See also Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1874) ("not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted").

Contrary to Justice Black's *Oregon* opinion and the *dicta* in *Classic* and *Smiley*, both the legislative history and this Court's holdings suggest that the power of Congress under the Elections Clause does not trump the states' power under the Elector-Qualifications Clause. As Madison explained at the Constitutional Convention, "'[t]he qualifications of electors and elected [are] fundamental articles in a Republican [Government] and ought to be fixed by the Constitution,'" and "'[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution.'" *Oregon*, 400 U.S. at 210 (*quoting* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249-50 (1911)) (Harlan, J., concurring in part and dissenting in part). Significantly, this litigation has demonstrated that the registration of unqualified non-citizen voters is prevalent, which sharpens the issues presented here into a case or controversy, one that neither *Classic* nor *Smiley* presented on the precise questions presented here.

An early draft of the Constitution gave the states authority over voter qualifications, "subject to the proviso that these qualifications might 'at any Time

be altered and superseded by the Legislature of the United States.'" *Oregon*, 400 U.S. at 289 (*quoting* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153) (Harlan, J., concurring in part and dissenting in part). The Committee on Detail struck that proviso and replaced it with the proviso tying voter qualifications to the most numerous branch of the state legislature. *Id.* (*citing* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164). A subsequent attempt to restore congressional oversight of voter qualifications was rejected as well. *Id.* at 290 (*citing* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201). "Few principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). For that reason alone, this Court should recognize that the Elections Clause does not provide Congress the authority to overrule the states' voter qualifications.

The post-convention ratification debates confirm that conclusion. Madison argued that, because "the right of suffrage is very justly regarded as a fundamental article of republican government," the issue of voter qualifications should not be subject to legislative control of the Congress or the states:

> It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason

> just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason[.] ... The provision made by the convention appears, therefore, to be the best that lay within their option.

THE FEDERALIST NO. 52, at 323 (C. Rossiter ed. 1961) (Madison). Rather than force all states into a single solution or under the control of Congress, the genius of the Elector-Qualifications Clause is that it submits each state to the criteria by which that state already has bound itself for its own state-law purposes.

Hamilton was equally clear that power over voter qualifications was "no part of the power to be conferred upon the national government":

> But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

THE FEDERALIST NO. 60, at 369 (C. Rossiter ed. 1961) (Hamilton) (emphasis in original). Consistent with the Elections Clause's plain language, this Court has recognized that Hamilton's remarks reflect the

clause's focus on *procedural* issues. *U.S. Term Limits v. Thornton*, 806 U.S. 779, 833-34 (1995).[6]

In contrast to this clear history, Plaintiffs rely on the NVRA to allow the registration of ineligible non-citizen voters. This Court cannot reconcile the Elections Clause's purely procedural focus with the substantive ends that Plaintiffs seek to attribute to the NVRA. Whether by invalidating the NVRA as applied here or by relying on the doctrine of constitutional avoidance to reject Plaintiffs' interpretation, this Court should reverse the Ninth Circuit's unprecedented intrusion into states' powers under the Elector-Qualification Clause.

CONCLUSION

For the foregoing reasons and those argued by Arizona, the Court should reverse the Ninth Circuit.

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[6] The ratification debates also confirmed that the plain language of the Elections Clause limited that clause to process: "The power over the manner of elections does not include that of saying who shall vote: – the Constitution expresaly says that the qualifications which entitle a man to vote for a state representative. It is, then, clearly and indubitably fixed and determined *who* shall be the electors; and the power over the manner only enables them to determine *how* these electors shall elect – whether by ballot, or by vote, or by any other way. Is it not a maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving any absurdity? By construing it in the plain, obvious way I have mentioned, all parts will be valid.") 4 Debates on the Adoption of the Federal Constitution, at 71 (J. Elliot ed. 1863) (Steele statement at North Carolina ratifying convention) (emphasis in original).

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AMICUS CURIAE BRIEF

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Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ELECTION ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 12-71

ARIZONA, *et al.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR ELECTION ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici are current and former state and local election officials from around the country. Collectively, they have administered elections—including the registration process—for more than 150 years. (Biographical information on each amicus is in the appendix to this brief.) Amici have a keen interest in promoting a strong electoral system, both by maximizing the level

[1] No counsel for a party authored any part of this brief and no person other than amici curiae and their counsel made a monetary contribution to the preparation or submission of the brief. Letters of consent are on file with the Clerk of the Court.

of participation by eligible voters and by preventing all forms of voting fraud. Amici's extensive experience gives them particular insight into the issues presented in this case.

SUMMARY OF ARGUMENT

Allowing individuals to register to vote by mail serves the important and salutary function of increasing citizen participation in voting, both by encouraging qualified individuals to register and by making it significantly easier for them to do so. The National Voter Registration Act's authorization of registration by mail has certainly produced these beneficial effects.

Although some individuals and groups have expressed concern that mail registration creates or exacerbates the risk of voting by non-citizens, amici's collective experience is that efforts by non-citizens to register and vote are extremely rare. This experience is confirmed by a variety of data showing how uncommon such efforts are.

Arizona's remedy to this low-incidence problem, by contrast, has already led the state to reject tens of thousands of registrations, many from citizens eligible to vote. That is not surprising, because many citizens do not have and cannot easily obtain the proof of citizenship that Arizona requires. The widespread rejections are troubling because they burden American citizens' fundamental right to vote—and in many cases effectively deprive them of that right. Arizona's proof-of-citizenship requirement also deters citizens from participating in our democracy, because of the significant burden it imposes on eligible voters. The requirement also increases the likelihood of errors in processing registration forms, causing additional impermissible disen-

franchisement. Ultimately, the number of eligible voters prevented from voting by Arizona's requirement would dwarf the number of ineligible voters prevented from doing so.

That result is not consistent with Congress's purpose in enacting the mail-registration provisions of the NVRA, which was to increase voter participation by providing a convenient and uniform way to register. Moreover, after considering the potential for voter fraud by non-citizens and balancing any concerns against the benefits of a simple mail-registration process, Congress rejected proposals that would have permitted states to require documentary proof of citizenship from registrants using the federal form. In Congress's judgment, such a requirement was both contrary to its legislative purpose and unnecessary in light of other anti-fraud provisions in the bill. Arizona's proof-of-citizenship requirement constitutes the same type of obstacle rejected by Congress in enacting the NVRA more two decades ago. The court of appeals correctly struck it down.

ARGUMENT

I. MAIL REGISTRATION UNDER THE NVRA LOWERS BARRIERS TO REGISTRATION AND THUS PROMOTES VOTER PARTICIPATION

Based on their collective 150-plus years administering elections around the country, amici's judgment is that allowing voter registration by mail is a valuable tool for boosting overall voter registration and participation. Congress expressed that judgment in authorizing mail registration as part of the National Voter Registration Act. That mail-registration process, including the prescription for a uniform federal form for registra-

tion for federal elections, provides several significant benefits.

First, the process provides eligible voters a convenient and accessible method of registering. Mail registration allows individuals to register without making a special trip to their state or local election office, and indeed without ever having to leave home. For those individuals for whom travel is difficult or costly, including some older or disabled Americans as well as the poor, that convenience can relieve a significant burden.

Registration by mail also greatly improves accessibility for those citizens who cannot take advantage of the Act's "motor voter" provision, *see* 42 U.S.C. § 1973gg-3, because they do not drive or have not applied for a driver's license using their current address. Urban residents, minorities, older and disabled Americans, and the poor are particularly likely to fall into this category. *See, e.g.*, Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 1 (2005) (finding that 23 percent of adults over 65 in Wisconsin, as well as 53 percent of African-Americans and 57 percent of Hispanics in Milwaukee County, lack a driver's license);[2] Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: Pol. Sci. & Pol. 111, 113, 115 tbl. 4 (2009) (reporting similar results from Indiana, California, New Mexico, and Washington).[3] Similarly, many post-secondary students who attend school away from their parents' home do not obtain a new driver's

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[2] *Available at* http://www4.uwm.edu/eti/barriers/DriversLicense.pdf.

[3] *Available at* http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf.

license (or change the address on an existing license) when they move to start school. In fact, one study found that only 2 percent of students living in residence halls at several universities had driver's licenses bearing their dormitory addresses. *See* Pawasarat at 2. Because the other 98 percent of these students never applied for a license (or submitted a change of address) using their school address, the NVRA's "motor voter" provision did not help make voter registration more accessible.[4]

Second, the mail-registration process employs a generic federal form that is simple and easy to complete. The NVRA specifies that the federal form may "require only such identifying ... and other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). In implementing this provision, the Election Assistance Commission has created a form that fits on a single page—with the very first

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[4] Although the NVRA also provides for registration at certain public agencies, *see* 42 U.S.C. § 1973gg-5, that is not an adequate substitute for mail registration: Due in part to such agencies' non-compliance with NVRA requirements, the number of registration applications coming from such agencies diminished by almost 80 percent over a ten-year period, from a high of over 2.6 million in 1995-1996 to under 550,000 in 2005-2006. *See* Hess & Novakowski, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007*, at 3, 15 tbl. 1a (2008), *available at* http://www.demos.org/sites/default/files/publications/UnequalAccessReport-web(2).pdf; Rogers, *The National Voter Registration Act Reconsidered* 6 (2011), http://www.acslaw.org/sites/default/files/Rogers_-_NVRA_Reconsidered_1.pdf ("Many state offices admit to having no registration forms on hand for several years running; many employees do not even know they are required to offer registration."). In any event, many eligible voters have no contact with the designated public agencies.

question being whether the applicant is a U.S. citizen—and can be completed in a matter of minutes. *See* Election Assistance Commission, *Voter Registration Application*.[5] Moreover, because the form can be used nationwide, voters need not spend time and effort searching for a registration form specific to their state. The simplicity of the federal form further lowers barriers to registration and therefore increases participation.

Third, the mail-registration process facilitates voter registration drives, which are a key tool for boosting registration of eligible voters. In many other democratic countries, the government plays an affirmative role in ensuring that eligible citizens are registered to vote. *See* Rosenberg & Chen, *Expanding Democracy: Voter Registration Around the World* 2 (2009).[6] In the United States, by contrast, that role is performed largely by private organizations, through registration drives. The NVRA's uniform mail registration form assists that effort because it "permit[s] voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events." S. Rep. No. 103-6, at 26 (1993).

In short, mail registration under the NVRA is an important means of maximizing voter registration and participation.

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[5] http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (last visited Jan. 22, 2013).

[6] *Available at* http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf.

II. Registration And Voting By Non-Citizens Is Rare

A. Available Data Are Consistent With Amici's Experience That Registration And Voting By Non-Citizens Is Extremely Uncommon

Amici strongly support the objective of ensuring that only eligible voters participate in U.S. elections. Actual fraud in voting is an obvious cause for concern, and preventing such fraud is and has been a key part of amici's work. Amici's experience, however, is that efforts by non-citizens to register and vote are exceedingly rare. Indeed, in the more than 150 years that they have collectively spent administering elections, amici have experienced almost no cases of non-citizens registering to vote, let alone actually casting a ballot. In light of this, amici's view is that the danger of non-citizen registration and voting does not justify the imposition of significant new barriers to registration by eligible individuals.

Amici's experience regarding the infrequency of non-citizen registration and voting is shared by other election officials around the country. One survey, for example, reported that "[o]f the elections officials who were interviewed, representing counties that comprised 40 percent of Georgia's population, none believed that non-citizens had fraudulently registered to vote or voted." Baker & Ward, *Survey of Georgia Elections Officials on Voting by Non-Citizens* 1 (2009) (footnote omitted).[7] Similarly, one media account reported the statement by the president of the Colorado County Clerks Association that "county clerks across the state are not aware of a problem with noncitizens voting ille-

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[7] *Available at* http://brennan.3cdn.net/a996354605662fac4b_b6m6i6r2k.doc.

gally." Lofholm, *Colo. Clerks Press Gessler for Details on Alleged Illegal-Voting Problem*, Denver Post, Apr. 13, 2011;[8] *see also* Moreno, *Republicans Look for Voter Fraud, Find Little*, Associated Press, Sept. 24, 2012 (noting that North Carolina's bipartisan elections board found no evidence of widespread fraud by noncitizens);[9] Bonnifield & Johnson, *Facts About Ineligible Voting and Voter Fraud in Minnesota* 16 (2010) (county attorneys in Minnesota "did not express a concern about [non-citizen voting]");[10] Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 654 (2007) (in Ohio, "a statewide survey of each of [the] eighty-eight county Boards of Elections found only four instances of ineligible persons attempting to vote ... in the state's 2002 and 2004 general elections," or "a fraud rate of 0.000044%").

Election officials' view that fraudulent registration by non-citizens is rare extends to registration using the federal form, the concern targeted by Arizona's Proposition 200. Studies of NVRA implementation by the Election Assistance Commission and Federal Election Commission, which are based on reports from election administrators from across the country, have not found non-citizen registration using the federal form to be a significant or widespread problem. *See, e.g.*, FEC, *The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office*

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[8] *Available at* http://www.denverpost.com/news/ci_17831783#ixzz2G6jjRysc.

[9] *Available at* http://bigstory.ap.org/article/republicans-look-voter-fraud-find-little.

[10] http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf (last visited Jan. 22, 2013).

2001-2002, at 12 ("As in previous reports, States indicated very few problems with mail registration.").[11] Nor have election administrators called for measures to address any such problem. *See id.* at 13 ("The States submitted no recommendations to improve registration by mail.").

The data on convictions for voting by non-citizens are also consistent with amici's experience. In fiscal years 2002 through 2005, the federal government prosecuted only 28 cases of alleged voting by ineligible voters, leading to just 18 convictions nationwide. *See* Lipton & Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007, at A1.[12] Some of those cases, moreover, likely involved non-residents, individuals convicted of felonies, or some other type of ineligible voter besides non-citizens. Similarly, a comprehensive effort to compile election-fraud cases from all 50 states uncovered only 19 convictions for non-citizen voting between 2000 and the present. *See* News21, *Election Fraud In America*.[13] These convictions constituted under 3 percent of election fraud convictions generally—a smaller percentage than, for example, double voting, vote buying, and voting by individuals convicted of felonies. *See id.*

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[11] *Available at* http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf.

[12] *Available at* http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0 (click "In the Courts" hyperlink under "Multimedia").

[13] *Available at* http://votingrights.news21.com/interactive/election-fraud-database/ (last visited Jan. 22, 2013) (adding "Convicted" and "Pleaded" totals under case status after sorting by "Type of Accusation": "Non-Citizen Casting Ineligible Vote").

Data from states that collect information on investigations of voter fraud confirm the rarity of non-citizen voting. From 1994 to 2006, the California Secretary of State's Office, which handles complaints of election fraud, received 1,588 complaints alleging voter fraud; of these, only 28 alleged voting by non-citizens and just two resulted in a finding that a violation occurred. *See* Minnite, *The Myth of Voter Fraud* 57, 59 tbl. 4.2 (2010). Over the same period, the Oregon Secretary of State's Office, which logs all election-law complaints aside from campaign finance violations, recorded 5,400 complaints, of which only three fell in the "miscellaneous" category that encompasses non-citizen voting. *Id.* at 74 tbl. 4.4; *see also id.* at 72 ("Among the states, Oregon appears to have the best system for keeping records of election law complaints."). In none of these cases was a criminal violation found. *Id.* at 74 tbl. 4.4; *see also* Bonnifield & Johnson at 10, 16 (reporting nine investigations of non-citizen voting in Minnesota, constituting 0.78 percent of all ineligible voter investigations, and no convictions).

The numbers for registration fraud are likewise very small. Of 55 convictions for federal election crimes between October 2002 and September 2005, only five were for registration fraud—a category that also includes registration by individuals convicted of felonies and other ineligible voters. *See* Lipton & Urbina. In California, 104 cases of voter registration by non-citizens, or about eight a year, were found to have occurred between 1994 and 2006. Of these, all but three were found to be inadvertent. *See* Minnite at 59 tbl. 4.2. Those three apparently fraudulent registrations (or even the larger population of eight incorrect registrations a year) must be compared to California's non-citizen population of more than five million—the highest in the nation—and an estimated voting age popula-

tion of almost *30 million*. *See id.* at 60; Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010*, at 14 tbl. 1a (2011).[14]

While the foregoing statistics would not, for obvious reasons, capture cases in which non-citizens managed to register and vote without detection, the statistics cover time periods in which federal and state officials, along with non-governmental entities, devoted substantial efforts to uncovering non-citizen registration and voting, as well as voter fraud more generally. Indeed, during most of the last decade, election fraud was a federal law-enforcement priority that, according to Justice Department officials, was "'outranked only by crimes involving terrorism and espionage.'" Minnite at 45 (quoting statement by Craig C. Donsanto, Director of DOJ's Election Crimes Branch); *see also id.* at 46-47 (describing the department's Ballot Access and Voting Integrity Initiative and its efforts to identify voter fraud). Similar energetic efforts to ferret out such fraud occurred at the state level. *See infra* pp. 12-13 (describing efforts in Florida and Colorado); Slater, *Ballot Box Scrutiny: AG Fails To Uncover Major Voting Fraud*, Dallas Morning News, May 18, 2008, at 1A. It is therefore unlikely that significant levels of non-citizen voter fraud have gone undetected.

B. Reports Of Non-Citizen Voting And Registration Are Often Erroneous

1. The data discussed above may seem inconsistent with media accounts, which often portray non-citizen voting fraud as pervasive. Based on amici's ex-

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[14] *Available at* http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf.

perience, however, claims about such fraud are often highly exaggerated. *See, e.g.*, Hasen, *The Voting Wars* 59 (2012) ("Most of what gets called fraud in the media turns out to be innocent error or even coincidence."). Colorado's Secretary of State, for example, asserted in 2011 that 11,805 non-citizens were registered to vote there. *See* Moreno, *Republicans Look For Voter Fraud*. As those claims were challenged by voters and the press, that number dwindled by almost 99 percent, first to 3,903 and then to 141. *See id.* And even that last number lacks integrity. After eight of the 141 were reported to have voted in Denver, the Denver clerk and recorder's office investigated and found that all eight were citizens. *See id.*

Similarly, in Florida "the state's Division of Elections said that as many as 180,000 registered voters weren't citizens." Moreno, *Republicans Look For Voter Fraud*. But when challenged that number was reduced by nearly 99.9 percent, first to 2,600 and then to 198. *See id.*; Caputo et al., *Florida Sends Election Departments List of 198 Potential Noncitizens*, Miami Herald, Sept. 26, 2012.[15] At least some of the 198, moreover, have asserted that they are U.S. citizens and have proof of citizenship. *See* Caputo et al. The reality, then, is that "[s]tate officials in key presidential battleground states ... found only a tiny fraction of the illegal voters they initially suspected existed." Moreno, *Republicans Look For Voter Fraud*.

2. In both Colorado and Florida, the inflated claims resulted in part from officials' reliance on outdated or flawed data in government databases, includ-

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[15] *Available at* http://www.miamiherald.com/2012/09/26/3022387_p2/florida-sends-election-departments.html.

ing driver's license information that failed to accurately reflect drivers' changed citizenship status. *See* Moreno, *Republicans Look For Voter Fraud.* Many errors were discovered only after checking a database containing federal immigration records, *see id.*, including information on naturalization, *see* Marouf, *The Hunt for Noncitizen Voters*, 65 Stan. L. Rev. Online 66, 66-68 (2012).[16] Even that process was fraught with potential for error, both because of likely errors in matching state lists of voters to records in the database, *see id.* at 68, and because, as federal officials warned, "the list's information is incomplete and does not provide comprehensive data on all eligible voters," Babington, *Feds Give Florida List of Resident Noncitizens*, Chi. Sun-Times (Associated Press), July 14, 2012.[17]

Indeed, researchers studying these issues more generally have concluded that outsized claims of voting fraud can be attributed in part to outdated or flawed information in government databases and to errors in matching that data to lists of registered voters:

> Allegations of ineligible felon ..., deceased, and ... non-citizen voting are based on [matching] machine lists of names, birth dates, and sometimes addresses of such people against a voting record.... However, there are a number of pitfalls for the unwary that can lead to grossly overestimating the number of fraudulent votes,

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[16] *Available at* http://www.stanfordlawreview.org/sites/default/files/online/articles/Marouf_-_65_Stan_L_Rev_Online_66.pdf.

[17] *Available at* http://www.suntimes.com/news/washington/13784760-452/feds-give-florida-access-to-list-of-resident-noncitizens.html.

> such as missing or ignored middle names and [suffixes] or matching on missing birth dates.

Serebrov & Wang, *Voting Fraud and Voter Intimidation: Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations*, 6 Election L.J. 330, 340-341 (2007). Problems also arise because in large populations, it is common for two or more individuals to share both a name and a birthday. *See* McDonald & Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L.J. 111, 121 (2008). An eligible voter may therefore be wrongly identified as a non-citizen because a non-citizen shares the eligible voter's name and birthday. The result is that "allegations of vote fraud or purging of voter registration rolls by list matching almost assuredly will find a large proportion of false positives." Serebrov & Wang at 341.

In sum, registration and voting by non-citizens is an exceedingly rare phenomenon, one that is already subject to meaningful checks. It thus does not, in amici's judgment, afford a legitimate basis for imposing substantial additional barriers to voter registration by mail.[18]

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[18] Multiple mechanisms operate to both deter and detect non-citizen voter fraud. *First*, the federal form requires applicants to swear under penalty of perjury that they are citizens, and it alerts them that providing false information risks imprisonment and deportation. *See Voter Registration Application*; 42 U.S.C. §§ 15483(b)(4)(A)(i), 1973gg-7(b)(2)(C).

Second, federal law requires an applicant for registration to provide his driver's license number or, if he does not have a driver's license, the last four digits of his social security number. *See* 42 U.S.C. § 15483(a)(5)(A)(i). States use this information to check the information provided on registration forms against that stored in databases belonging to the state motor vehicle authority or the

III. Additional Proof-Of-Citizenship Requirements Impose Substantial Burdens On Voters And Increase The Likelihood Of Errors And Delays

A. Proposition 200 Has Prevented And Would Prevent Thousands Of Eligible Citizens From Registering To Vote

The foregoing makes clear that Arizona's Proposition 200 is an attempt to solve a problem of extremely limited scope. But the collateral consequences of the attempt are not harmless. To the contrary, the proposition's proof-of-citizenship requirement erects serious barriers to many eligible voters' ability to exercise their fundamental right to vote.

Social Security Administration. *See id.* § 15483(a)(5)(B). States can also take other steps to check information provided. For example, election officials can obtain notification from county jury administrators when a potential juror seeks to be excused on the basis of non-citizenship. *See* GAO, *Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists* 16 (2005), *available at* http://www.gao.gov/new.items/d05478.pdf.

Third, mail registrants must vote in person and present appropriate identification the first time they vote in a jurisdiction, unless (a) they include a copy of such identification with their registration application or (b) the state has been able to verify their identity based on a driver's license or social security number. *See* 42 U.S.C. § 15483(b). States can also require mail registrants to vote in person the first time they vote in a jurisdiction even if one of these exceptions applies. *See id.* § 1973gg-4(c)(1).

Finally, federal law provides severe penalties for fraudulent registration. *See, e.g.*, 42 U.S.C. § 1973gg-10 (five years' imprisonment for false registration information); 18 U.S.C. § 1015(f) (similar); *id.* § 611(b) (one year imprisonment for voting by a non-citizen). These penalties—which surely have a strong deterrent effect considering the minimal benefits a person receives from voting fraudulently—are in addition to penalties under state law.

1. Many individuals who are eligible to register and vote do not have and cannot easily obtain the documentation that Arizona requires to satisfy its proof-of-citizenship requirement. A recent national survey, for example, found that 7 percent of U.S. citizens "do not have ready access to citizenship documents." Brennan Center for Justice, *Citizens Without Proof* 2 (2006);[19] *see also* Greenstein et al., *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* (2006) (national survey finding that 5.7 percent of citizens do not have access to a passport or birth certificate).[20]

This problem typically falls with particular severity on certain groups: For example, fully 12 percent of citizens who earn less than $25,000 "do not have a readily available U.S. passport, naturalization document, or birth certificate"—a rate more than twice as high as the general population. *See Citizens Without Proof* at 2. Similarly, "[r]ural residents ... are more than twice as likely to lack a birth certificate or passport as non-rural residents." Greenstein et al. at 4. Indeed, 4.5 million rural citizens may lack such documents. *See id.* Older Americans, citizens without a high school diploma, and African-Americans are also less likely than other citizens to possess citizenship documents. *See id.* at 3.

Citizens who lack such documents will often find it costly or difficult to obtain them. "[M]ore than 10 million eligible voters live more than 10 miles from their nearest state ID-issuing office," and many of those offices—particularly in rural areas—have limited hours.

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[19] *Available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

[20] *Available at* http://www.cbpp.org/files/9-22-06id.pdf.

Gaskins & Iyer, *The Challenge of Obtaining Voter Identification* 5 (2012).[21] Even if the distance problem can be overcome, obtaining a passport or a driver's license often requires a person to produce a birth certificate. Some citizens, however, lack birth certificates because they were not born at a hospital. J.A. 243. And Arizona makes it quite difficult for such a person—years later—to obtain a certificate, requiring no less than four separate elements of proof, each of which may present significant or even insuperable obstacles. As the district court explained:

> To obtain a delayed birth certificate for a child who is 15 years of age or older, the following documentation must be provided: (1) an affidavit by someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was ten years old stating the child's name, date of birth, place of birth, and the date the document was created; (3) an independent factual document that was established at least five years prior to the application date stating the child's name, date of birth, place of birth, and the date the document was established; and (4) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created.

Id. at 258-259. The difficulty is even greater if the citizen was born outside Arizona: Individuals "who were

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[21] *Available at* http://brennan.3cdn.net/773c569439b50452e0_kzm6bo5l6.pdf.

born out of state may [face] additional delays while attempting to obtain documentation from their birth state. For example, one state noted that it could take 6 months or more to obtain a birth certificate from another state." GAO, *States Reported that Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens* 18 (2007).[22]

2. The realities just discussed are undoubtedly a significant part of the reason many eligible voters have had their registration applications rejected pursuant to Proposition 200's proof-of-citizenship requirement. The district court found that in the two-and-a-half years from January 2005 to September 2007, 31,550 voters had their registrations rejected due to the requirement. *See* J.A. 263. By May 2008, the number had reached 38,000. *See* Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, N.Y. Times, May 12, 2008, at A1.[23] For some Arizona counties, the rejection rates were particularly high. For example, in the first eight months of 2006 (the second year the proposition was in effect), fully one-sixth of all registrations in Maricopa County—the state's most populous—were rejected for failure to provide proof of citizenship. *See 1 in 6 Maricopa County Voter Registrations Rejected for No ID*, Tucson Citizen, Aug. 16, 2006.[24]

Most of the individuals whose applications were rejected, moreover, did not or could not successfully re-

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[22] *Available at* http://www.gao.gov/new.items/d07889.pdf.

[23] *Available at* http://www.nytimes.com/2008/05/12/us/politics/12vote.html?pagewanted=all.

[24] *Available at* http://tucsoncitizen.com/morgue/2006/08/16/22897-1-in-6-maricopa-county-voter-registrations-rejected-for-no-id/.

apply—and thus were denied their right to vote. As the district court noted, for those individuals whose registrations were rejected between 2005 and 2007 because of inadequate proof of citizenship, approximately 70 percent, or about 20,000, were not subsequently able to register. *See* J.A. 264.[25]

Finally, the number of rejected applications does not take into account those citizens who are deterred from attempting to register in the first place because it is too onerous or costly to obtain and submit the necessary documentation. The total number of eligible voters prevented or deterred from voting is therefore almost certainly higher than the already substantial number of voters actually rejected.

B. Proposition 200 Increases The Likelihood Of Errors And Delays By Election Officials

1. Arizona's proof-of-citizenship requirement causes erroneous rejections of registrations, thus denying qualified citizens the right to vote

If the tens of thousands of individuals whom Proposition 200 has blocked or deterred from registering were in fact not eligible to vote, there would be no cause for concern. But that is not the case. To the contrary, the district court found here that "[m]ost reject-

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[25] The number of people directly prevented from voting by Arizona's proof-of-citizenship requirement is therefore far higher than the number prevented from doing so by the Indiana voter-identification requirement at issue in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008). *See* Pitts & Neumann, *Documenting Disenfranchisement*, 25 J.L. & Pol. 329, 330, 365 n.128 (2009) (concluding that in the 2008 elections, Indiana's requirement caused approximately 900 ballots not to be counted).

ed applicants"—including "86.6% of Latinos and 92.9% of non-Latinos"—"listed their birthplace in the United States," which makes them United States citizens. J.A. 264. Consistent with that finding, the recorder's office in Arizona's most populous county concluded that of the thousands of people whose registrations were rejected because of Proposition 200, "[m]ost ... were probably legal citizens who for one reason or another lacked the required identification." *1,100 Pima Voter Applicants Rejected Down*, Tucson Citizen, Aug. 17, 2006.[26]

Erroneous rejections arise for at least two reasons. *First*, as discussed above, significant numbers of eligible voters lack access to the documents required to prove citizenship. *Second*, even when eligible voters possess documentation and attempt to submit it, they may nonetheless be rejected as a result of processing errors or subtle deficiencies in their documentation.

The large number of rejections that Proposition 200 has engendered, many erroneous, is not particularly surprising. Election-law scholars have long known—and amici's own experience confirms—that even "seemingly simple new registration requirements" can create significant complications. Tokaji, *Early Returns on Election Reform*, 73 Geo. Wash. L. Rev. 1206, 1224 (2005). Such requirements necessitate "the exercise of discretion by election officials" that can, "either purposefully or inadvertently, result in the denial of some citizens' votes." *Id.*; *see also id.* at 1224-1228 (explaining how decisions by Ohio in 2004 on whether to accept registration applications with missing information or

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[26] *Available at* http://tucsoncitizen.com/morgue/2006/08/17/22965-1-100-pima-voter-applicants-rejected-down/.

submitted on insufficiently heavy card stock caused applications to be treated inconsistently).

Arizona's proof-of-citizenship requirement illustrates this danger well. For example, even among women who have ready access to documents proving citizenship, a third do not have such documentation bearing their current legal name. *See Citizens Without Proof* at 2. Election officials therefore face the task of determining whether to accept or reject applications in which the name on the application does not match that on the document proving citizenship. Additionally, errors are often made in the process of determining what constitutes adequate proof of a name change when submitted. Errors in handling situations like these—and thus wrongful rejections—are inevitable.

Indeed, past experience demonstrates the problems that surround the form of proof Arizona citizens are most likely to submit: a driver's license. When a voter submits a license as proof of citizenship along with the federal form, Arizona checks the license against a Motor Vehicle Division database. The state rejects the application if the license was obtained using non-citizen identification—a "Type F" license—or was issued before October 1, 1996. J.A. 261. Applicants cannot determine from the face of their license, however, whether they have a "Type F" license. As a result, applicants who were naturalized after obtaining their (Type F) licenses will have their registrations wrongly rejected. *See id.* at 262.

This concern is far from hypothetical. According to the Department of Homeland Security, 12,784 Arizona residents became naturalized citizens in 2011 alone. *See*

DHS, *Profiles on Naturalized Citizens: 2011*.[27] Because Arizona requires photographs and vision tests to be updated only once every 12 years (Arizona driver's licenses never expire), many of these individuals unknowingly possess "Type F" licenses. *See* Arizona Department of Transportation, Motor Vehicle Division, *Driver License Information*.[28] And many, unaware of the problem, will likely submit their licenses as proof of citizenship with their federal voter-registration form. In fact, the district court here found that 1,300 applicants could not register online because they possessed either a "Type F" license or one issued before October 1, 1996. *See* J.A. 261. Given the large number of Arizona citizens that possess "Type F" licenses, it is likely that many of those rejected were in fact citizens eligible to vote.

Other states' experience confirms the risk of disenfranchisement that inheres in using driver's license data as a means to establish citizenship. Just last year, for example, Florida election officials sought to purge non-citizens from the state's voting rolls. Relying on driver's license data, officials compiled a list of 2,700 voters suspected of being non-citizens and began canceling their registrations. The officials were forced to suspend the effort, however, after discovering that the list was "outdated and inaccurate." Brown, *Florida Halts Its Search for Violations of Voter Law*, N.Y. Times, June 9, 2012, at A13.[29] The president of the

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[27] http://www.dhs.gov/profiles-naturalized-citizens-2011-1 (last visited Jan 22, 2013).

[28] http://www.azdot.gov/mvd/DLInfo.asp (last visited Jan. 22, 2013).

[29] *Available at* http://www.nytimes.com/2012/06/09/us/politics/florida-stops-search-for-ineligible-voters-on-list.html?_r=0.

Florida State Association of Supervisors of Elections explained that "[w]e felt the information wasn't credible and reliable," and that "[t]oo many voters on the state's list turned out to actually be citizens." *Id.*

In a similar effort in Colorado, officials "sent letters to nearly 4,000 people questioning their citizenship as part of a plan to have them voluntarily withdraw or confirm their eligibility to vote." Moreno, *Many Suspected Ineligible Colorado Voters Found To Be US Citizens*, Bangor Daily News (Associated Press), Aug. 30, 2012.[30] After running 1,400 of the names through a federal database, however, officials discovered that at least 1,200 were U.S. citizens. *Id.* Further investigation confirmed that at least some of the remainder were also U.S. citizens. Moreno, *Republicans Look for Voter Fraud.* As in Florida, the false positives arose in part because officials relied on driver's license data, singling out many naturalized citizens who had obtained driver's licenses prior to obtaining their citizenship. *See* Hoover, *U.S. Citizens Among Those Who Got Letters Questioning Right To Vote*, Denver Post, Aug. 28, 2012, at 19A.[31]

In sum, Arizona's imposition of a proof-of-citizenship requirement results not simply in tens of thousands of registration rejections; a very high proportion are *erroneous* rejections, i.e., rejections of eligible voters.

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[30] https://bangordailynews.com/2012/08/30/news/nation/many-suspected-ineligible-colorado-voters-found-to-be-us-citizens/.

[31] *Available at* http://www.denverpost.com/breakingnews/ci_21420652/u-s-citizens-among-those-who-got-letters?IADID=Search-www.denverpost.com-www.denverpost.com#ixzz2GE2CPR9P.

2. The Arizona requirement will lead to additional delays in processing voter registration forms

Proposition 200 burdens qualified individuals' right to vote for an additional reason. Reviewing and verifying registration applications is already a time-consuming and exacting process. There are multiple processes required by federal law for verifying an applicant's eligibility. And the limited period between the close of registration and Election Day means that elections officials frequently lack sufficient time to undertake the communication with both applicants and other government databases that is necessary to ensure eligibility while avoiding unlawful disenfranchisement. The too-frequent result is that eligible citizens are unable to vote in a particular election, despite having submitted the registration form by the specified deadline. *See, e.g.*, GAO, *Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote* 7 (2005) ("[W]e and others have found that challenges managing the voter registration process can result in eligible citizens not being registered to vote on Election Day.");[32] *see also* Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 3 (2005) (noting that one of the primary problems in the 2000 election was that "voters were discouraged or prevented from voting by the failure of election offices to process voter registration applications").[33]

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[32] *Available at* http://www.gao.gov/assets/250/247944.pdf.

[33] *Available at* http://www1.american.edu/ia/cfer/report/full_report.pdf.

Arizona's proof-of-citizenship requirement only exacerbates this problem. Requiring election officials to verify another document in addition to the registration form itself adds more time and complexity to an already-challenging task. Yet Proposition 200 does not allocate any additional resources for processing voter registration applications, and Arizona has not put forward any evidence that it has done so. This is yet another way in which Proposition 200 will deny qualified citizens their right to vote.

IV. Arizona's Proof-Of-Citizenship Requirement Is Inconsistent With The History Of The NVRA

Amici's views regarding the wisdom of a proof-of-citizenship requirement like the one at issue here accord with those of the Congress that adopted the NVRA. Congress was well aware of arguments, advanced by those opposed to the bill, that mail registration would lead to widespread instances of non-citizens registering and voting in U.S. elections. But Congress was also aware that reports on states' experience with mail registration (including reports from election administrators like amici) demonstrated that in fact such registration did *not* cause significant problems with non-citizen voter fraud. Members also concluded that other measures in the bill were sufficient to address any residual concerns. Congress accordingly rejected amendments that would have permitted states to require proof of citizenship, finding them contrary to the purposes of the NVRA generally and its mail registration provision in particular. Arizona's proof-of-citizenship requirement contradicts this legislative judgment and conflicts with Congress's objectives in enacting the statute.

1. The Senate report accompanying the NVRA explained that the legislation sought to address "[t]he declining numbers of voters who participate in Federal elections." S. Rep. No. 103-6, at 2. And the House report explained that the primary obstacle to increasing voter registration (and hence voter turnout) was "a complicated maze of local laws and procedures ... through which eligible citizens had to navigate in order to exercise their right to vote." H.R. Rep. No. 103-9, at 3 (1993); *see also* 42 U.S.C. § 1973gg(a)(3) (finding that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities"). The "unfinished business of registration reform," the House report concluded, was "to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3.

Congress therefore sought, the two reports explained, to "provide uniform national voter registration procedures for Federal elections," S. Rep. No. 103-6, at 3, that would "reduc[e] barriers, particularly government-imposed barriers, to applying for registration wherever possible," and thereby "[e]xpand[] the rolls of the eligible citizens who are registered," H.R. Rep. No. 103-9, at 3; *accord Young* v. *Fordice*, 520 U.S. 273, 275 (1997) (explaining that the NVRA "requires States to provide simplified systems for registering to vote in federal elections" (emphasis omitted)).

One way the Act sought to accomplish this goal was to permit registration by mail. Mail registration, the Senate report stated, was "an effective means for increasing the voter rolls because it relieves the voter of the need to appear in person at one central registration

office during prescribed hours and it permits organizations to go to the voter with organized registration drives." S. Rep. No. 103-6, at 12. The effectiveness of mail registration was established by "substantial evidence" from the "approximately half" of states that had implemented such measures, which showed "that this procedure not only increased registration but successfully reached out to those groups most underrepresented on the registration rolls." H.R. Rep. No. 103-9, at 4.

2. Prior to passage of the NVRA, however, opponents argued that by making voter registration easier, the bill would enable non-citizens, and in particular undocumented immigrants, to register and vote. *See, e.g.*, 139 Cong. Rec. 1,343-1,344 (1993) (statement of Rep. Livingston); S. Rep. No. 103-6, at 55 (minority views) (alleging that up to 24 percent of ballots were cast by illegal aliens). These concerns extended specifically to the mail registration provision. *See, e.g.*, S. Rep. No. 103-6, at 55 (minority views) ("Nationwide mail registration, as proposed by this bill, raises the very real specter of adding to America's illegal immigration problems."); 139 Cong. Rec. 2,448 (1993) (statement of Rep. Callahan).

The legislative record indicates that Congress declined to alter the mail registration provision in response to these concerns for two reasons. *First*, the experience of several states, recounted in part by reports from election administrators like amici, demonstrated that mail registration was not associated with any significant level of non-citizen voter fraud. *See, e.g.*, S. Rep. No. 103-6, at 12 ("[V]oter registration officials in all eighteen States for which data are available reported they have had little or no fraud with post car[d] registration.").

Second, many members believed that the bill's anti-fraud provisions were "sufficient to deter fraudulent registrations." S. Rep. No. 103-6, at 26. These provisions included: requiring "that mail applications include a statement of voting qualifications and an attestation," signed "under penalty of perjury, that the applicant meets all those requirements," *id.* at 13; creating a new federal crime for the submission of false or fraudulent information on voter registration applications, 42 U.S.C. § 1973gg-10(2)(A); S. Rep. No. 103-6, at 11; permitting states to require mail registrants to vote in person the first time they vote in a jurisdiction, 42 U.S.C. § 1973gg-4(c)(1); and requiring "notice to each applicant of the disposition of his or her application," which "could be met by a follow-up mailing ... as a means of protecting against possible fraud in the mail registration process," H.R. Rep. No. 103-9, at 10. These various safeguards were deemed sufficient in large part because, according to reports from election administrators, they had already proven effective in states that had implemented mail registration. *See, e.g.*, S. Rep. No. 103-6, at 13 (citing evidence from California, New York, Texas, Ohio, New Jersey, and Pennsylvania).

3. Unpersuaded, some members of Congress contended that the law's postcard-registration provision improperly prevented states from employing "modest verification procedures," S. Rep. No. 103-6, at 54 (minority views), including requiring documentary proof of citizenship. In their view, fraud by non-citizens "might be combated by requiring proof of citizenship at the time of registration," but "mail registration under [the NVRA] would preclude such corrective action." *Id.* at 55; *see also id.* (explaining that the NVRA would prohibit Alaska's requirement that some mail registration

applicants provide "identification or other documentation" of Alaska residency with their application).

These members accordingly sought to amend the bill to either permit or require states to insist on documentary proof of citizenship at registration. *See, e.g.*, 139 Cong. Rec. 2,455-2,456 (statement of Rep. McCollum); *id.* at 1,349-1,350 (statement of Rep. Livingston) (noting rejection of such an amendment in the House). These efforts gained traction only in the Senate, which passed a floor amendment providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." *Id.* at 5,237 (1993). The amendment's sponsor explained that it would, among other things, permit states to "ask for a photocopy of a document proving citizenship with mail-in applications." *Id.* at 9,571-9,572 (1993) (statement of Sen. Simpson).

Following debate on the amendment in both chambers, the conference committee rejected this amendment as "not necessary or consistent with the purposes of this Act." H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).[34] The committee noted in particular that the amendment could "permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.* The conference committee's report was adopted by both chambers, and the bill as reported was enacted into law. *See* Pub. L. No. 103-31, 107 Stat. 77 (1993).

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[34] For examples of debate on the amendment, see 139 Cong. Rec. 9,226 (1993) (statement of Rep. Livingston); *id.* at 9,631 (1993) (statement of Sen. Helms); *id.* at 9,221-9,222 (1993) (statement of Rep. Conyers); *id.* at 7,178 (1993) (statement of Rep. Richardson).

4. Congress thus gave focused consideration to the concern that mail registration would create or exacerbate problems with non-citizen voter fraud. Its enactment of the NVRA reflects its judgment that such problems were unlikely to be significant and that the statute's anti-fraud provisions were sufficient to address any problems that might occur. The legislative history reveals, moreover, that both supporters and opponents of the NVRA shared the common belief that the statute as enacted prevented states from requiring documentary proof of citizenship when registering by mail. That understanding prompted opponents to propose the amendment discussed above, which was rejected as inconsistent with the statute and particularly with the mail registration provision.

Ultimately, the NVRA reflects a legislative judgment—confirmed by amici's experience—that any benefit from permitting states to require documentary proof of citizenship when registering by mail is outweighed by the serious harm that such a requirement would do to Congress's objective of providing a convenient and uniform means of registration. Arizona's proof-of-citizenship requirement is contrary to this legislative judgment and an obstacle to the NVRA's objectives. It therefore should be set aside.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

- **Jennifer Brunner** served from 2007 to 2011 as Ohio's Secretary of State, the first woman elected to that position. Her work in reforming Ohio's voting systems earned her a Profile in Courage Award in 2008 from the bipartisan board of the John F. Kennedy Library and Museum. Before serving as Secretary of State, she was elected twice and served nearly five years as a state trial court judge in Columbus on the Franklin County Court of Common Pleas. In addition to 15 years in or private practice focusing on election law, Brunner served as a member of the Franklin County Board of Elections and as Legislative Counsel to one of her predecessor Secretaries of State. Since leaving elective office she has rejoined the law firm she founded in 1988, Brunner Quinn. In 2012 she served as an expert to the Serbian government through the auspices of USAID on campaign finance and judicial reform. Her efforts in forming and co-chairing Fair Elections Ohio in 2011 after leaving office, and in promoting a statewide referendum, succeeded in preventing restrictive changes to Ohio voting laws. She is the author of *Cupcakes and Courage*, published in 2012.

- **Jennifer Collins-Foley** served from 1996 to 2004 in the office of the Registrar-Recorder/County Clerk for Los Angeles County, the largest election jurisdiction in the United States. She has developed election day manuals used by officials in Los Angeles County, Miami-Dade County, and Washington, D.C. She also developed and produced *Best Practices in Election Administration, Management and Security for Voting Systems and Provisional Voting: A Tool Kit for Election Administrators and Stakeholders* for the U.S. Election Assistance Commission. She has also

worked extensively with foreign officials to improve their electoral systems.

- **George Gilbert** has been the Director of Elections for Guilford County, North Carolina, for the past 25 years. He is a nationally Certified Election/ Registration Administrator (CERA) through the Election Center and Auburn University. He also served during 2001 and 2005 on the Election Center's Ad Hoc Task Force on Election Law Reform, and co-chairs the Legislative Committee of the National Association of Election Officials.

- **Ernest Hawkins** served Sacramento County, California, for 27 years; he was the Registrar of Voters from 1980 to 2003, and a Senior Administrative Analyst in the Registrar's office from 1976 to 1980. Mr. Hawkins has been deeply involved with the Election Center—a national nonprofit organization of election officials offering research, information, training, and certification—since the organization's inception, and has been the chair of the Board of Directors for the last 20 years. Mr. Hawkins has also served in leadership positions with the National Association of County Recorders, Election Officials and Clerks; the California Association of Clerks and Election Officials; the California Voter Foundation; and Electionline.org. He has further served on the Federal Election Commission's Advisory Panel and is currently a member of the Advisory Board for the U.S. Election Assistance Commission. In July 2000, he was inducted into the Election Hall of Fame.

- **Phil Keisling** served as Oregon's Secretary of State from 1991 to 1999. Before that he served as a member in the Oregon House of Representatives. Phil is currently director of the Center for Public Service at

the Mark O. Hatfield School of Government, Portland State University. (Institutional affiliation is for identification purposes only and does not constitute institutional endorsement of this brief.)

- **Scott Konopasek** has administered elections in three different jurisdictions, serving as the Director of Elections of Snohomish County, Washington, from 1997 to 2002; then as the Registrar of Voters for San Bernardino County, California, from 2002 to 2004; and most recently as the Director of Elections of Salt Lake County, Utah, from 2008 to the present. Between 2004 and 2008, as the Managing Partner of Forefront Election Solutions LLC, he consulted with more than forty counties and states on election-related projects. He served on the Standards Board for the U.S. Election Assistance Commission, and was a member of the National Task Force for Election Reform; the National Association of County Recorders, Election Officials and Clerks; and the International Association of Clerks, Recorders, Election Officials, and Treasurers.

- **Deborah L. Markowitz** served as Vermont Secretary of State from 1998 to 2011. She is also a past president of the National Association of Secretaries of State, and continues to serve on the Board of Advisors of the U.S. Election Assistance Commission. She is currently Secretary of the Vermont Agency of Natural Resources.

- **Conny McCormack** served six years as the Elections Administrator of Dallas County, Texas; seven years as the Registrar of Voters for San Diego County, California; and twelve years as the Registrar-Recorder/County Clerk for Los Angeles County, California. Ms. McCormack has also been an Elec-

tions Specialist with the International Foundation for Electoral Systems, with extensive experience consulting on elections abroad. Among her other affiliations, she was the President of the Texas Association of Election Administrators and of the California Association of Clerks and Election Officials.

- **Gary McIntosh** served as Elections Director for the State of Washington from 1988 to 2001. Prior to that he served for ten years as Elections Supervisor for Thurston County, Washington. He is also a past president of the National Association of State Elections Directors. Among other accomplishments, Mr. McIntosh helped design and secure legislative approval of Washington State's "Motor Voter" registration program, and played a key role in Congress's adoption of a similar program in the NVRA.

- **David Orr** has served since 1990 as the County Clerk for Cook County, Illinois, the second-largest election district in the United States. He previously served for over a decade as alderman of the 49th Ward in Chicago, and was also briefly acting mayor of the city in 1987.

- **Connie Schmidt** served as the Election Commissioner for Johnson County, Kansas, from 1995 to 2004, after a long career in various aspects of local government. During her tenure, Johnson County pioneered several new, and award-winning, election programs that have been replicated around the country; after stepping down as commissioner, Ms. Schmidt served as co-project manager for several best practices programs of the U.S. Election Assistance Commission. Ms. Schmidt has also served as the chair of the Professional Education Program Certification Board for the Election Center, and as a

member of the National Association of State Election Directors Voting Systems Standards Board; she has received the National Association of Secretaries of State Medallion Award for outstanding service to American democracy, and has been inducted into the Elections Hall of Fame.

- **Deborah Seiler** served as registrar of voters for San Diego County, California, from 2007 through 2012. She previously served as assistant registrar in Solano County, California; as a member of the California Fair Political Practices Commission, and as assistant to the California Secretary of State for elections and political reform. She also co-chaired both the secretary's advisory panel on elections and the Elections Legislative Committee of the California Association of Clerks and Election Officials.

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AMICUS CURIAE BRIEF

No. 12-71

In The Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Petitioners,

v.

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE; BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LE CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE KRIS W. KOBACH, KANSAS SECRETARY OF STATE, IN SUPPORT OF PETITIONERS

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Kris W. Kobach, in his capacity as the Secretary of State of the State of Kansas respectfully submits this amicus curiae brief in support of the Petitioners.[1]

INTERESTS OF THE AMICUS CURIAE

Kris W. Kobach is the Secretary of State for the State of Kansas (hereinafter, referred to as the "Amicus"). Effective January 1, 2013, Kansas will require proof of citizenship from all new voter registration applicants.[2] In addition, like all states, Kansas is required by 42 U.S.C. § 1973gg-4(a)(1) to "accept and use" the Federal Mail Voter Registration Form (the "Federal Form"). As the Election Officer for the State of Kansas, the Amicus has an interest in ensuring that the Kansas proof of citizenship requirement is not preempted by federal law. The Amicus is directly involved in the acceptance and usage of the Federal Form, and believes it to be fully consistent with Kansas's proof of citizenship requirements.

[1] All parties have consented to the filing of this brief. Copies of communications providing consent are submitted herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] K.S.A. § 25-2309.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit Court of Appeals ("Ninth Circuit") below suffers from two fundamental problems. First, the decision ignores this Court's precedent that traditional preemption doctrines apply, even in the context of the Elections Clause. Second, the Ninth Circuit's decision directly conflicts with the principle that only Congress, not the executive branch, can preempt State laws. Third, contrary to the determination of the Ninth Circuit, the language of the National Voter Registration Act ("NVRA") actually expressly allows states to require proof of citizenship.

ARGUMENT

I. The Ninth Circuit Erred by Holding that Traditional Preemption Doctrines Do Not Apply to the Elections Clause.

This Court has a long history of applying traditional preemption doctrines, in the context of the Elections Clause. Despite this case law to the contrary, the Ninth Circuit deviated from this long history by holding that a different preemption analysis must be used in regard to the Elections Clause. The Ninth Circuit rejected this Court's language that the presumption against preemption applies to "all" preemption cases (regardless of whether the case arises under the Supremacy Clause or the Elections Clause). *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis

added) (*quoting Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Instead, the Ninth Circuit explained that states have no reserved authority over federal elections due to the fact that federal elections did not exist prior to the existence of the federal government. *Gonzalez v. Arizona* (*Gonzalez III*), 677 F.3d 383, 392 (9th Cir. 2012). The Ninth Circuit then concluded that due to the absence of reserved authority, courts need not follow the traditional preemption doctrines such as the presumption against preemption and the rule that the intent to pre-empt must be plainly stated. *Id.* The Ninth Circuit then created a new preemption standard specifically for Elections Clause issues. *Id.* By reaching this conclusion, the Ninth Circuit read the Elections Clause in a vacuum and ignored this Court's bedrock principle that sections of the Constitution must be read in conjunction with other sections as well as examined individually. *See, eg., M'Culloch v. Maryland*, 17 U.S. 316, 331 (1819). Therefore, the Elections Clause must be read in conjunction with the Supremacy Clause. Consequently, the Ninth Circuit's new standard is in direct conflict with the precedents of this Court.

"Because the States are independent sovereigns in our federal system, [this Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). Further, this Court has traditionally started its analysis in preemption cases, particularly those involving a field traditionally occupied by the

States, "with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (*quoting Medtronic*, 518 U.S. at 485, and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The administration of elections is plainly a field traditionally occupied by the state; indeed, the federal government has never directly administered any election.

This new standard created by the Ninth Circuit ignores the historic role occupied by the States in administering federal elections. Traditionally, states have led the way in election reforms and the federal government has given leeway to the States to do so. For example, individual states led election reform by enacting legislation over an 8-year period between 1888 and 1896 adopting the "Australian" secret ballot system. During this period 90 percent of the States accounting for 92 percent of the national electorate made these reforms. *Burson v. Freeman*, 504 U.S. 191, 204-205 (1992) (plurality opinion). Additionally, states have an interest in "orderly administration and accurate recordkeeping" of elections. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). Furthermore, this Court has repeatedly found that the Elections Clause grants the States "broad power" to administer federal elections. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Cook v. Gralike*, 531 U.S. 510, 511 (2001); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). Because

the States traditionally occupy the field of federal elections, it follows that courts should apply the traditional presumption against preemption principle in the context of the Elections Clause. Along these lines, when considering Elections Clause preemption, this Court has held preemption occurs only when there is a clear, express conflict between federal and state law. *See Ex Parte Seibold*, 100 U.S. 371, 386 (1879); *Smiley v. Holm*, 285 U.S. 355, 369 (1932). Such a clear, express conflict does not exist here nor does the Election Assistance Commission ("EAC") have the power to preempt state law without congressional authorization.

II. Only Congress Can Preempt

As explained above, it is clear that traditional preemption doctrines apply in this case. With that being true, it also must follow that the traditional principle that only Congress, not the executive branch, can preempt state law also applies. As stated in the Petitioner's Brief, the EAC's Arizona decision was basically at the whim of an employee of the EAC after the board issued a split decision. It should be noted that now because the EAC currently has no commissioners, the Commission does not "reject" the inclusion of a state's proof of citizenship requirement language. Rather, the EAC "cannot take action" on a request to amend the state instructions. Consequently, the Ninth Circuit's interpretation of NVRA essentially gives a "pocket veto" to an agency which believes it "cannot take action" to either approve or

reject instructions because it lacks commissioners. Federal preemption of state law requires direct and clear congressional action and not the mere absence of a federal agency's ability to act. The Ninth Circuit ignored this traditional principle, as well as the established precedent of this Court, and if allowed to stand will allow an executive branch agency to arguably preempt state law by the agency's inability to take action. Such cavalier treatment of state law must not be allowed.

The principle that only Congress may preempt state law is deeply rooted in both the Constitution and the case law of both this Court and inferior Article III Courts. The Supremacy Clause of Article VI of the Constitution gives preemptive power to only the

> Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Consequently, unilateral preemption by an executive agency cannot occur. Only the "unmistakabl[e]" words of Congress can displace the states. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). "It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise

valid state laws. . . ." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Further and significantly, the Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 131 (2d Cir. 2007) (reversed in part on other grounds, *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009)). "Congress has the exclusive power to make laws necessary and proper to carry out the powers vested by the United States Constitution in the federal government." *In re NSA Telecoms. Records Litig.*, 633 F. Supp. 2d 892, 908 (N.D. Cal. 2007) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). While it is true that an executive action can have a preemptive effect, this can only occur if the executive action occurs within the four corners of a congressional act that clearly authorizes the action. That is not the case here.

In reaching its decision, the Ninth Circuit placed emphasis on the decision of the Election Assistance Commission ("EAC") to reject Arizona's request that the Federal Form be modified to require documentary proof of citizenship in order to register. *See Gonzalez III*, 677 F.3d at 400. In so doing, the Ninth Circuit stated that Congress had "entrusted" the EAC with the authority to determine the contents of the Federal Form, and that regardless of state law Arizona was required to accept and use the form without imposing additional requirements. *Id.* Despite this declaration from the Ninth Circuit, it is far from clear that Congress has granted the EAC the authority to deny the

States the right to impose additional requirements before accepting the information on the Federal Form.

NVRA requires the EAC, in consultation with the States, to develop a federal mail voter registration form ("Federal Form"). 42 U.S.C. § 1973gg-7(a). Further, the NVRA requires that the States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). A great deal of confusion exists in regards to the meaning of the phrase "accept and use." This confusion can be seen in the history of this case. First, the district court denied a motion for preliminary injunction which would have stopped implementation of the Arizona citizenship requirement. *See Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1046 (9th Cir. 2007). Later, on appeal, the Ninth Circuit upheld the district court's denial, holding that Arizona's proof of citizenship requirement was not preempted by the NVRA. *Id.* at 1049-1051. Following this ruling of the Ninth Circuit and the district court's subsequent summary judgment on the NVRA claim, the decision was appealed to a second panel of the Ninth Circuit Court of Appeals. *See Gonzalez v. Arizona* (*Gonzalez II*), 624 F.3d 1162 (9th Cir. 2010). On this appeal, a divided three-judge panel reversed the earlier ruling and held that the NVRA did prohibit Arizona from imposing additional requirements on the Federal Form. *Id.* at 1185-1191. The judges of the Ninth Circuit then voted to rehear the case en banc, and issued the decision being appealed here. *See Gonzalez III*, 677 F.3d at 390. Although the divided en banc Ninth Circuit found the NVRA to preempt the

Arizona registration requirement, there was still disagreement amongst the panel of the meaning of the phrase "accept and use." In his concurring opinion, Chief Judge Kozinski stated that the issue is "difficult and perplexing" and explained that due to the vague language from Congress, the phrase "accept and use" could be construed to either allow a state to add additional requirements to the Federal Form or to prevent states from adding additional requirements to the Federal Form. *Id.* at 439-440 (Kozinski, Chief J., concurring). When applying traditional preemption doctrines, this vagueness prevents preemption, especially preemption by the executive branch.

III. The NVRA Does Not Preempt State Law Because it Allows States to Require Proof of Citizenship According to its Express Language

Having established that the States traditionally occupy the election field, the relevant questions are: 1) whether Congress has preempted the States and 2) whether Congress has expressly granted authority to the EAC to preempt. The answer to both of these questions is no.

"In *all* pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added) (*quoting Medtronic*, 518 U.S. at 485 (1996), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As explained above, the Ninth Circuit concluded that NVRA's vague language was sufficient to preempt state law.

In the words of the Chief Judge of the Ninth Circuit "Congress used tantalizingly vague language, which would make it very useful to fall back on a rule of construction, such as the Clear Statement Rule or the Presumption Against Preemption." *Gonzalez III*, 677 F.3d at 439-440 (Kozinski, Chief J., concurring). This is undoubtedly true, and the only reason the Ninth Circuit did not follow the words of the Chief Judge is because the Ninth Circuit chose to ignore traditional preemption doctrines and the precedents of this Court. Had the Ninth Circuit applied the presumption against preemption, there is little doubt that the Ninth Circuit would have had to rule in favor of Arizona and against preemption. As previously explained, the phrase "accept and use" can be interpreted in two ways. One way, allowing States to accept and use the Federal Form while also requiring additional documentation, would not preempt State law. The other interpretation would preclude the States from requiring anything other than the Federal Form itself, thus preempting State law. Because the presumption against preemption applies, it must be presumed that Congress did not intend this vague

language to preempt State law. Additionally, as it must be presumed that this vague language does not preempt State law and does not prohibit the States from requiring that additional information be submitted with the federal form, the EAC also does not possess the authority to do so. Only Congress, not the Executive branch may preempt State law. *See North Dakota v. United States*, 495 U.S. 423, 442 (1990). In the vague language of the NVRA, Congress did not expressly grant the EAC the authority to preempt State law. Thus, the EAC has no authority to preempt a State statute requiring additional documentation be submitted with the Federal Form.

However, in reaching this conclusion, the Ninth Circuit failed to adequately explain why the plain language of the NVRA did not expressly allow states the option of requiring proof of citizenship. Under NVRA, the Federal Form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to *assess* the eligibility of the applicant. . . ." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). The key phrases in this section are "may require identifying information" and "assess."

Based on this language, NVRA allows states to require "indentifying information" regarding the eligibility of voter registration applicants. Based on this language, the NVRA cannot be read as the Ninth Circuit held, because they held that "identifying information" regarding citizenship is limited to a box for the applicant to check if the applicant is a citizen

of the United States. However, checking a box plainly does not constitute providing "identifying information." A checked box does not allow the possibility of requiring any information from the applicant. The applicant provides nothing that "identifies" him or her in any way. In contrast, the documents that establish citizenship, *eg.*, a passport or birth certificate, do constitute "identification" documents. The Ninth Circuit's reading renders this statutory language superfluous.

Furthermore, the word "assess" similarly cannot be squared with the Ninth Circuit's interpretation. To assess something requires action on the part of the one doing the assessing. In addition, an assessment assumes a spectrum of possible outcomes. Black's Law Dictionary defines "assessment" as the "[d]etermination of the rate or amount of something, such as a tax or damages." Black's Law Dictionary 111 (7th ed. 1999). The American Heritage Dictionary defines "assess" as "[t]o evaluate; appraise". The American Heritage Dictionary of The English Language: New College Edition 79 (1979). For State election officials to assess the eligibility of an applicant would require that there be something to assess. For an assessment to occur, something more than a mere checked box is needed to evaluate and make a determination of eligibility. One essential eligibility requirement is United States citizenship. The check box leaves no room for assessment because it is either checked or not checked. A determination that nothing beyond checking a box may be required to determine

an applicant's citizenship would result in the word "assess," as used in the statute, being surplusage.

It is a long-standing and fundamental principle of statutory interpretation that courts must not interpret statutes in a fashion that renders them redundant or duplicative – mere "surplusage." Words in a statute "cannot be regarded as mere surplusage." *Potter v. United States*, 155 U.S. 438, 446 (1894). "Since all the words used by the legislature have meaning, courts must avoid reading a statute so as to render any superfluous." *Alioto v. Hoiles*, 341 Fed. Appx. 433, 439 (10th Cir. 2009). The rule against surplusage is "a cardinal rule of statutory construction." *United States v. Hasan*, 526 F.3d 653, 666 (10th Cir. Okla. 2008). "We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987); *United States v. Noone*, 913 F.2d 20, 25 n.5 (1st Cir. 1990) (rejecting a statutory reading would render 18 U.S.C. § 3161(h)(1)(F) "mere surplusage"). To read the statute in question in a way that prevents the requirements of additional eligibility requirements would be to render the words "require identifying information" and "assess" superfluous.

CONCLUSION

For all of the above reasons, the Kansas Secretary of State respectfully requests this Court to reverse the decision of the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the Ninth Circuit's improper application of federal pre-emption standards.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether Congress can defy the states' constitutional power under the Elector Qualifications Clause to determine *who* votes by creating regulations for *how* elections are to be conducted under the Elections Clause that impede the states' ability to ascertain the citizenship and eligibility of prospective voters.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

This case hinges on the proper interpretation of "tantalizingly vague language" in the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.* The NVRA directs that the states "shall accept and use" a federal voter registration form created by the U.S. Election Assistance Commission (EAC) for registration by mail. 42 U.S.C. § 1973gg-4. The National Mail Voter Registration Form ("Federal Form") requires prospective voters only to check a box to signify their eligibility to vote as U.S. citizens and sign, under penalty of perjury, an affirmation that they are U.S. citizens, meet state eligibility requirements, and subscribe to any oath required. 42 U.S.C. § 15483(b)(4)(A)(i); 42 U.S.C. § 1973gg-7(b)(2)(C). No other proof of U.S. citizenship is required by the Federal Form for registration by mail, thus making it highly susceptible to fraud. The NVRA, however, allows states to create and use their own forms, which, like the Federal Form, may require only such "identifying information" as necessary to enable state officials to assess prospective registrants' eligibility. 42 U.S.C. § 1973gg-4(a)(2); 42 U.S.C. § 1973gg-7(b).

Believing that the state was becoming a safe haven for illegal immigrants through lax standards in the issuance of identity cards, Arizona amended its voter registration procedures by state initiative (Proposition 200) in 2004, requiring County Recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Prospective registrants using the Federal Form are asked to

provide one of various forms of proof while registering. As a result, Arizona contends that it "accepts and uses" the Federal Form, but has properly required supplemental documents in light of its compelling interest in avoiding fraudulent voting by the large number of unqualified electors living within its borders. Since its passage, Proposition 200 has been credited with preventing 20,000 ineligible individuals from improperly registering to vote. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 95. The Ninth Circuit, however, held that Arizona's practice of supplementing the Federal Form was superseded by the NVRA. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012).

The question then is the proper interpretation of "accept and use." In the opinion below, at the onset, the Ninth Circuit found that the framework of the Elections Clause, not the Supremacy Clause, properly governed the issue. *Id.* at 392-93. In so doing, the Ninth Circuit majority was able to justify ignoring pre-emption doctrine, which would give deference to state interests, while engaging in statutory construction. The majority concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." *Id.* at 392 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). The Ninth Circuit majority next determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." *Gonzalez*, at 394. The court finally concluded that because

of the supplemental proof requirement, Arizona did not "accept and use" the Federal Form, and therefore Arizona's requirement was preempted "when applied to the Federal Form." *Id.* at 403.

The majority opinion thus threatens the delicate balance of our federalist system by reading the powers of the Elections Clause so broadly that states become mere bystanders to the conduct of federal elections – even when confronted by ineligible noncitizens voting. With a proper consideration of state prerogatives in the electoral process, Arizona's proof of citizenship requirements mesh with the intent of the NVRA and other federal statutes, and do not conflict with them.

II. ARGUMENT

The Ninth Circuit erred when it determined that the Supremacy Clause did not control its pre-emption analysis. This allowed the Ninth Circuit to disrupt the "delicate balance" between the states and the federal government. Not only did the Ninth Circuit ignore the role the states retain in the electoral system under the Elections Clause, it also failed to properly address how its ruling implicated the Elector Qualifications Clause, an area of paramount state power. Accordingly, the traditional rules of pre-emption should have applied in this case, such as the presumption against pre-emption and the plain statement rule. Under such normal pre-emption rules, the fact that the states were not clearly prohibited from taking supplemental steps to ensure voter eligibility would have been taken into account in Arizona's

favor. Additionally, longstanding rules of statutory construction would have shown how Arizona's proof of citizenship requirements worked in concert with the larger purpose of the NVRA and other federal statutes dealing with voting and registration by noncitizens.

A. The Elector Qualifications Clause controls in this case, thus the Ninth Circuit should have given proper deference to Arizona's statutory scheme.

The U.S. Constitution grants Congress the power to regulate congressional elections. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, Sec. 4. This power to regulate *how* elections are held is broad. As Chief Justice Hughes stated:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; *in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.*

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added).

Yet the Framers established *state*, and not federal, definition of voter qualifications. Qualifications for voters in federal legislative elections correspond to those for voters in the "most numerous Branch of the State Legislature." U.S. Const. art. I, Section 2, cl. 1. As James Madison wrote in Federalist No. 52,

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned.

The Federalist No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961). The Elector Qualifications Clause clearly establishes the states' authority to regulate *who* may vote in elections. As Justice Douglas, writing for a unanimous Court, wrote, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633; *Mason v. Missouri*, 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959) (superseded by statute).

In this case, the Ninth Circuit's decision allows Congress, through indirect means, to restrict

Arizona's authority to determine its Elector Qualifications. The Federal Form requires prospective voters only to check a box to signify their eligibility to vote as U.S. citizens and sign an affirmation under penalty of perjury. 42 U.S.C. § 15483(b)(4)(A)(i); 42 U.S.C. § 1973gg-7(b)(2)(C). No other proof of U.S. citizenship is required by the form for registration by mail, which, as Arizona determined and sought to remedy, makes it susceptible to fraud. In *United States Term Limits v. Thornton*, 514 U.S. 779, 829 (1995), this Court held that Arkansas's restriction on qualifications for service in Congress was "an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." Justice Stevens noted that "'constitutional rights would be of little value if they could be . . . indirectly denied.' . . . The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections." (internal citations omitted) *Id.*

This indirect violation of the Elector Qualifications Clause, if left standing, would upset the delicate balance of the federalist system. As Justice Kennedy wrote in his concurring opinion in *U.S. Term Limits v. Thornton*, "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." *Id.*, at 841.

The lax standards of proof of citizenship on the Federal Form, in conjunction with Arizona's unique

situation as a border state, a main gateway for illegal immigration, and a state with one of the highest percentages of illegal immigrants among its total population, conspire to undermine Arizona's constitutional prerogative to set the qualifications for its electors. Indeed, although all states have some presence of illegal immigrants, the illegal immigrant population is unevenly distributed throughout the country. According to the Pew Hispanic Center, "Unauthorized immigrants are concentrated in a relatively small number of states. The dozen states with the largest unauthorized numbers account for more than three-quarters (77%) of this population." Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011), p. 15.

Arizona is ranked among the highest states for both largest total number of illegals present in the state (8th) and the largest percentage of illegals within the total state population (5th). *Id.* Arizona is also the "main gateway for illegal border crossers" from Mexico. Daniel González, "Big Cut Set For Border Troops," *The Arizona Republic*, Dec. 21, 2011, p. A1. It stands to reason that a state with an extraordinary illegal immigration population would need to take precautionary measures to guarantee the integrity of the vote.

Furthermore, this large group of illegal immigrants has motives beyond voting when seeking voter registration card. A voter registration card can be

used to help an individual establish his identity, which is necessary when obtaining a driver's license or proving authorization to work in the U.S. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 90. Pursuant to the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a *et seq.*, prospective employees must establish their identities and ability to work in the U.S. by filling out a Form I-9, Employment Eligibility Verification, provided by the U.S. Citizenship and Immigration Services. (Available at http://www.uscis.gov/files/form/i-9.pdf.) Among the form's "Lists Of Acceptable Documents" used to establish identity is a voter's registration card. Thus, the laxity of the Federal Form's required proof of citizenship along with the need to seek work authorizations provides aliens with the means, motive and opportunity for fraudulent voter registration.

In short, the Ninth Circuit majority should have analyzed the interaction of the NVRA and Proposition 200 under the Electoral Qualifications Clause and normal rules of pre-emption doctrine. As will be shown below, even when analyzed under the Elections Clause, however, deference should be given to Arizona's nonintrusive means of ensuring the integrity of the electoral process. When pre-emption rules are used to evaluate the issue, Proposition 200 works in concert with the NVRA.

B. The Ninth Circuit's Misreading of the Elections Clause Improperly Turns States into "Mere Bystanders" in the Federal Electoral System.

The Ninth Circuit opinion rests on the proposition that the states have no inherent or reserved power in the regulation of federal elections: "In contrast to the Supremacy Clause, which addresses pre-emption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012). Instead, the majority stated that the Election Clause "establishes its own balance" and that the "'presumption against pre-emption' and 'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." *Id.*

Yet this notion that the states are mere bystanders in the conduct of elections is incompatible with the ratification debates and this Court's decisions. As James Madison stated at Virginia's ratifying convention,

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. *It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government*, in order to enable it to produce

> uniformity, and prevent its own dissolution. And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the state governments, the general government might easily be dissolved. *But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised.*

3 J. Elliot's Debates on the Federal Constitution 367 (1876) (emphasis added). Furthermore, as Justice Kennedy observed in *United States Term Limits v. Thornton*, the states are not completely without power in the conduct of elections. He wrote:

> [B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution . . . *grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, § 4, cl. 1.*

United States Term Limits v. Thornton, 514 U.S. 779, 841-42 (1995) (Kennedy, J., concurring) (emphasis added).

In *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court struck down Louisiana's open-primary scheme for violating the Elections Clause. The Court noted, however, that the states still have responsibility to run and regulate elections. In the opinion, the Court described the Elections Clause as:

> "[A] default provision; it invests the States with responsibility for the mechanics of congressional elections, . . . *but only so far as Congress declines to pre-empt state legislative choices*, see Roudebush v. Hartke, 405 U.S. 15, 24, 31 L. Ed. 2d 1, 92 S. Ct. 804 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate").

Foster v. Love, 522 U.S. 67, 69 (1997) (emphasis added). This pre-emption should be clearly stated, as was the case in *McConnell v. FEC*, in which the Elections Clause issues were implicated by the Bipartisan Campaign Reform Act's regulations of the states. This Court wrote:

> Several plaintiffs contend that Title I exceeds Congress's Election Clause authority to "make or alter" rules governing federal elections, U.S. Const., Art. I, § 4, and, by impairing the authority of the States to regulate their own elections, violates constitutional principles of federalism. In examining congressional enactments for infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer the States and state officials in carrying out federal regulatory schemes. . . . By contrast, Title I

> of BCRA only regulates the conduct of private parties. It imposes no requirements whatsoever upon States or state officials, and, *because it does not expressly pre-empt state legislation*, it leaves the States free to enforce their own restrictions on the financing of state electoral campaigns.

McConnell v. FEC, 540 U.S. 93, 186 (2003). The NVRA contains no such express pre-emption of a state's nonintrusive measures to establish eligibility.

Furthermore, this Court's opinions show that while congressional power is paramount, the federal regulation preempts state statutes only as far as they conflict. "The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1880). As shown below, the NVRA can clearly be read to allow states to take action as Arizona has done to preserve the integrity of the electoral process.

It must also be noted that congressional power to regulate elections under the Election Clause is not for mere convenience but is intended to safeguard rights. Returning to Justice Hughes's discussion in *Smiley*, supra, Congress has the power to impose "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). In this case, the fundamental rights of many different parties have

been implicated. Congress sought to promote the voting rights of prospective registrants through the NVRA. However, not only do Arizona and the other states have a right to determine their elector qualifications, but the individual voters of Arizona themselves have the right to have their votes counted without being diluted by unqualified voters. "Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974).

Therefore, as Judge Kozinski wrote, this Court has ample justification for applying pre-emption rules in the instant case. Judge Kozinski listed multiple reasons: the states' and their citizens' interest in ensuring the vote is granted only to qualified electors; the states' interest that the electoral process is conducted properly since they are being commandeered to administer it; the states' interest in their reputation for electoral fraud, and the risks of fraud and malfeasance that may differ from state to state. *Gonzalez v. Arizona*, 677 F.3d 383, 440 (9th Cir. 2012). Judge Kozinski concluded, "A case such as ours, where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." *Id.*

C. Proposition 200 Does Not Conflict With the NVRA Under Normal Rules of Pre-emption and Statutory Construction.

The next question is the proper interpretation of the Congress's direction to the states that they must "accept and use" the Federal Form. Does the NVRA mean "use this form and nothing else"? Judge Kozinski laid out two possible interpretations of this "tantalizingly vague language":

> For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

Gonzalez v. Arizona, 677 F.3d 383, 439 (9th Cir. 2012).

If this Court adopts traditional pre-emption doctrine associated with the Supremacy Clause as discussed above, the NVRA would not preempt Proposition 200. The NVRA includes no express direction that the Federal Form precludes states from seeking supplemental proof to establish citizenship.

> In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption

> that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996). Furthermore, federal law will impliedly pre-empt state law when the state and federal laws "conflict" – that is, when "it is impossible . . . to comply with both state and federal law" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 372-73 (2000).

Since it is clearly not impossible for Arizona to use and accept Federal Forms when they ask for supplemental proof, Congress's intent must be determined. Turning to canons of statutory interpretation to divine the full purposes and objectives, "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 438-39 (1935) (Cardozo, J., dissenting). As Justice Kennedy also wrote, "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The NVRA's stated purposes are:

> (1) to establish procedures that will increase the number of *eligible citizens* who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of *eligible citizens* as voters in elections for Federal office;
>
> (3) to *protect the integrity of the electoral process*; and
>
> (4) to ensure that *accurate* and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b) (emphasis added).

The stated goal of the statute is thus to promote the registration and participation of *eligible* citizens in a sound electoral process. Under federal and Arizona state law, of course, only U.S. citizens are eligible voters. 18 U.S.C. § 611; Ariz. Rev. Stat. § 16-101.

The NVRA allows states to create their own mail voter registration forms and demand information necessary to assess prospective voters' eligibility. 42 U.S.C. § 1973gg-4(a)(2). A state's registration form must meet the same criteria as the Federal Form:

> The mail voter registration form . . . may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant),

> *as is necessary to enable the appropriate State election official to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b) (emphasis added). It is unclear why it would be acceptable to seek "other information" when filling out a state form for federal elections but unacceptable to seek "other information" when filling out a federal form for federal elections. It would only make sense if the statutory requirements of the Federal Form set a floor, which the states could supplement as Arizona did.

In addition, the NVRA creates criminal penalties for submission of voter registration applications, or casting of ballots, that are known to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held. 42 U.S.C. § 1973gg-10(2).

> Criminal penalties
>
> A person, including an election official, who in any election for Federal office –
>
> (2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by –
>
> (A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

> (B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18, United States Code . . . or imprisoned not more than 5 years, or both.

42 U.S.C. § 1973gg-10. The NVRA also requires administrators of federal elections to "ensure that any eligible applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1). Finally, election administrators are required to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" in certain cases. 42 U.S.C. § 1973gg-6(a)(4).

Thus, the "end in view," in Justice Cardozo's words, of the NVRA is the promotion of the registration of *eligible* voters. Lax standards of proof when establishing citizenship increase the number of *ineligible* citizens who are registered, as has been demonstrated most recently in Florida and Colorado. See Ivan Moreno, "Colo. Furthers Citizenship Checks," Associated Press, Oct. 23, 2012. In addition, the NVRA recognizes that states may have their own information requirements to assess eligibility. To read the statute to mean that states with a high level of unqualified electors within their borders cannot take nonintrusive measures to prevent fraud would not comport with the meaning of the text as a whole.

The NVRA must also be read in the context of many federal statutes that address alien voting and

registration. If a potential registrant misrepresents his citizenship on a Federal Form and then votes, he is potentially subject to numerous federal criminal statutes. See Federal Prosecution of Election Offenses, 7th Ed. 2007, published by the U.S. Department of Justice; Christopher Indelicato and Naomi Pames, Election Law Violations, 45 Am. Crim. L. Rev. 305, Spring, 2012.

- 18 U.S.C. § 911 criminalizes false representations of U.S. citizenship. ("Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.")
- 18 U.S.C. § 611 makes it a crime for aliens to vote in "any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential Elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner."
- 18 U.S.C. § 1015(f) specifically criminalizes false claims to citizenship for the purpose of voting in any federal, state, or local election.
- 42 U.S.C. § 1973i(c) prohibits the knowing and willful (i) giving of false information of one's "name, address or period of residence in the voting district for the purpose of establishing [one's] eligibility

> to register or vote," (ii) *conspiring with another to encourage one's false registration or illegal voting*, or (iii) paying or accepting payment for registration or voting. *Id.* (emphasis added). Enacted as part of the Voting Rights Act of 1965, Congress intended that Section 1973i(c) protect both the actual results of elections, as well as the integrity of the electoral process. *United States v. Cole*, 41 F.3d 303, 307 (7th Cir. 1994).

There are many other instances in the federal criminal code that prohibit committing fraud and false statements generally which could be applied toward false statements on voter registration forms. See, e.g., 18 U.S.C. § 1001. In addition, it is important to note that Congress addressed the issue of false registration and voting as recently as 2002, during enactment of the Help America Vote Act (HAVA). Section 905(b) of HAVA, codified at 42 U.S.C. § 15544(b), states:

> (b) False Information in Registering and Voting. – Any individual who knowingly commits fraud or knowingly makes a false statement with respect to the naturalization, citizenry, or alien registry of such individual in violation of section 1015 of title 18, United States Code, shall be fined or imprisoned, or both, in accordance with such section.

Taken as a whole, the numerous criminal statutes enacted to penalize noncitizen voting, fraudulent voting and fraudulent voter registration suggest that Congress does not tolerate noncitizen voting.

The NVRA should not be read in a way that would allow ongoing fraud to occur. Election officials from more than 60 countries, including the head of Libya's national election commission, observed the 2012 American elections and found it "startling in that it depends so much on trust and the good faith of election officials and voters alike." Josh Rogin, "Foreign election officials amazed by trust-based U.S. voting system," Foreign Policy, Nov. 6, 2012. (Available at http://thecable.foreignpolicy.com/posts/2012/11/06/foreign_election_officials_amazed_by_trust_based_us_voting_system.) The news report continued:

> "It's very difficult to transfer this system as it is to any other country. This system is built according to trust and this trust needs a lot of procedures and a lot of education for other countries to adopt it," [Libyan Commissioner] Elabbar said. The most often noted difference between American elections among the visitors was that in most U.S. states, voters need no identification. Voters can also vote by mail, sometimes online, and there's often no way to know if one person has voted several times under different names, unlike in some Arab countries, where voters ink their fingers when casting their ballots.

Id. Disinterested foreign officials, with little experience running an election system, have confirmed Arizona's judgment about the risks of fraud. Surely the U.S. Congress did not intend to prohibit a reasonable requirement to establish American citizenship during registration.

D. The Elections Clause, Intended to Be Used Sparingly, Sought to Vindicate the People's Right to Equality of Their Representation in the House, Not Dilute Their Vote.

An underlying purpose of the Election Clause, it must be emphasized, is to protect the people's right of suffrage. Its wide scope provides the ability "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary *in order to enforce the fundamental right involved.*" *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added).

At the Virginia ratifying convention, James Monroe asked Madison to explain why the Framers gave general power over congressional elections to the national government. Madison responded that the national government needed a remedy to correct disproportionate representation within a state, suggesting an attempt to prevent the imitation of Britain's "rotten boroughs" where electoral districts with tiny populations diluted the power of larger districts. He said:

> [I]t was thought that the regulation of time, place, and manner, of electing the representatives should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states,

> particularly South Carolina, with respect to Charleston, which is represented by thirty members. *Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.*

3 J. Elliot's Debates on the Federal Constitution 367 (1876) (emphasis added). Other state ratifying conventions discussing the issue stressed "that the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures . . . and argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (internal citations omitted). In other words, the framers were concerned with the potential for improper dilution of the vote.

This Court should consider that, during its short life, Proposition 200 has been credited with preventing 20,000 ineligible individuals from improperly registering to vote. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 95. Although the Elections Clause gives Congress broad powers to regulate elections, it should not be used in a way that defeats its initial purpose and dilute the vote of thousands of Arizona citizens.

Finally, the Elections Clause reflects the framers' intention to prevent the abuse of power by spreading that power in a federal system. In Federalist No. 59,

Alexander Hamilton argued that there was no other aspect of the proposed Constitution "more completely defensible" than the Elections Clause because "every government ought to contain in itself the means of its own preservation." The Federalist No. 59, at 362 (A. Hamilton) (C. Rossiter ed. 1961). Without it, he explained, the states could let the federal government wither by inaction. Furthermore, Hamilton argued that the

> [The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, *whenever extraordinary circumstances might render that interposition necessary to its safety.*

(*Id.* at 362-63) (emphasis added). In this case, the safety of the federal government is threatened by noncitizen voting, just as in Arizona. The federal government has no interest in noncitizen voting, as indicated by numerous federal statutes prohibiting the practice.

CONCLUSION

The Ninth Circuit's decision is inconsistent with this Court's precedence and should be overruled. Arizona has taken reasonable, nonintrusive means to protect the sanctity of the electoral process. The

NVRA cannot be read as superseding Proposition 200 without doing violence to Arizona's constitutional prerogative to set the qualifications of its electors. When read in conjunction with normal rules of pre-emption or canons of statutory construction, the NVRA and Proposition 200 work in harmony, and do not conflict.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

JAN 22 2013

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
and JESUS M. GONZALEZ, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE LATINOJUSTICE PRLDEF, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND, ASIAN AMERICAN JUSTICE CENTER, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, ET AL., IN SUPPORT OF RESPONDENTS

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CHINESE PROGRESSIVE ASSOCIATION, FILIPINO ADVOCATES FOR JUSTICE, HISPANIC FEDERATION, HISPANIC NATIONAL BAR ASSOCIATION, JAPANESE AMERICAN CITIZENS LEAGUE, LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL INSTITUTE OF LATINO POLICY, NATIONAL ORGANIZATION OF MEXICAN AMERICAN RIGHTS, INC., ONEAMERICA, SOUTH ASIAN AMERICANS LEADING TOGETHER, AND SOUTH ASIAN BAR ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are national and state nonprofit organizations dedicated to protecting and advancing the rights of Latino and Asian communities in the United States.[2] Because Latinos and Asians make up a large percentage of the nation's naturalized citizens, Amici are particularly concerned by state statutes, like Arizona's Taxpayer and Citizen Protection Act (Proposition 200), that impede the electoral participation of naturalized citizens by making it especially difficult for them to register to vote. Amici therefore urge the Court to affirm the Ninth Circuit's decision invalidating the voter registration provisions of Proposition 200.

SUMMARY OF ARGUMENT

Our Constitution provides that "a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." *Luria v. United States*, 231 U.S. 9, 22 (1913). Arizona's Proposition 200 violates this mandate and is preempted by the National Voter Registration Act (NVRA) because it requires naturalized citizens—predominantly Latinos and Asians—to surmount additional and unique hurdles to exercise their fundamental right to vote. By

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[1] Letters from the parties consenting generally to the filing of briefs by amicus curiae are on file with the Court. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than Amici, their members, and their counsel made any monetary contribution to the preparation or submission of the brief.

[2] A description of amici is set forth in the attached Appendix.

imposing additional burdens on naturalized citizens who seek to register to vote, Proposition 200 conflicts with the NVRA's goal of creating a uniform and non-discriminatory voter registration system where applicants can easily register to vote by mail.

Specifically, of the six methods Proposition 200 prescribes for documenting one's citizenship, only three are realistically available to naturalized citizens. Each of these methods is so flawed as to require naturalized citizens to submit multiple applications and to expend significant time and resources:

1. The first available method requires naturalized citizens to *appear in-person* at the county recorder's office during the limited hours it is open to "present" a physical copy of their original naturalization certificate, as federal law prohibits photocopying this document. Naturalized citizens who work from 8:00 a.m. to 5:00 p.m. on weekdays will have to take time off to register to vote and risk a loss of wages. Alternatively, naturalized citizens may attempt to provide the "number of the certificate of naturalization," but Arizona does not have the ability to verify citizenship using this number and, therefore, voter registration applications that provide this number are automatically rejected. Arizona's attempt to cure this systemic flaw by accepting verifiable Alien Registration Numbers instead of the non-verifiable certificate of naturalization numbers has not been generally implemented, contradicts the plain language of Proposition 200 and, in any event, will still result in the rejection of the voter registration applications of newly naturalized citizens because of at least a two-week delay before this information will appear in the

database upon which county recorders rely. Additionally, many naturalized citizens are unable to provide an Alien Registration Number because they are required to return their permanent resident cards (which contain this number) prior to naturalizing, and many certificates of naturalization (especially for those citizens who naturalized before 1975) do not include this number.

2. The second available method, provision of a "driver's license or nonoperating identification license" number issued after October 1, 1996, is not available to the legion of naturalized citizens who obtained a driver's license before they naturalized. Unbeknownst to them, their driver's licenses are associated in the state database with an "F" code (for "Foreign") that renders such licenses useless to verify citizenship. This code typically remains in the database long after the driver is naturalized, but the code is not apparent on the face of the license. Thus, naturalized citizens are generally unaware of the limitation of their licenses until their voter registration applications are denied.

3. The third available method, mailing photocopies of their United States Passports, will not help most naturalized citizens because they do not have passports, and the application process is expensive and lengthy, with an average four-to-six week processing time. This option likewise requires naturalized citizens to appear in-person at a Passport Application Acceptance Facility or a Regional Passport Center with their original naturalization certificates—posing a hardship to those who cannot take off time from work during regular business hours or who risk losing wages for doing so.

Far from allowing straightforward mail-in registration, these onerous requirements can often be met only through an in-person appearance at a local governmental office to obtain and provide the requisite documentation. Often, naturalized citizens must submit a voter registration application multiple times before they successfully register to vote. Because the NVRA gives all citizens, including naturalized citizens, the right to use a streamlined, federal, mail-in voter registration form, Proposition 200 is preempted.

ARGUMENT

I. PROPOSITION 200 IS PART OF A LEGACY OF LAWS AND VOTER RESTRICTIONS THAT TARGET ARIZONA'S IMMIGRANTS AND ADVERSELY IMPACT ITS LARGE POPULATION OF NATURALIZED CITIZENS, MOST OF WHOM ARE LATINO OR ASIAN.

On November 2, 2004, Arizona voters approved Proposition 200, a ballot initiative predicated on the finding that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status . . . ." (Proposition 200, § 2 (admitted as Trial Ex. 1).) In addition to requiring residents to provide proof of citizenship to register to vote and specified forms of identification at the polls, Proposition 200 contains provisions excluding immigrants from non-federally mandated public benefits.[3] *See* Ariz. Rev. Stat. §§ 16-152; 16-166; 16-579; 46-140.01 (2012).

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[3] The only provision of Proposition 200 currently at issue before this Court is Ariz. Rev. Stat. § 16-166, which governs voter registration requirements.

For the entirety of its almost 150-year history, Arizona has enacted legislation specifically targeting naturalized citizens, immigrants, and minorities in order to make the voting process more cumbersome for these groups.[4] When it separated from New Mexico as a new territory in 1863, for instance, Arizona passed restrictive laws precluding Mexican Americans from electoral eligibility and voting. (Dist. Ct. FOF, at 42 (citing Testimony of Dr. Rosales, Tr. 354; 353-55).) Arizona also maintained literacy and education requirements for voter registration until 1972, a scheme which scholars have concluded was specifically used to intimidate Spanish-speaking and Native American minorities. (*Id.* at 42 (citing testimony of Dr. Rosales, Tr. 354).) And now, through the implementation of Proposition 200, Arizona requires its naturalized citizens to surmount additional and unique hurdles to exercise their right to vote.

Arizona's longstanding history of imposing burdens on immigrants and minority groups is not limited to the voting rights arena. Almost immediately after the Mexican-American War, Mexican property owners—new U.S. Citizens—were divested of their land. (*See id.*) In 1914, just two years after achieving statehood, Arizona passed a statute requiring employers in businesses with five or more employees to ensure that 80% of their workforce

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[4] The District Court found this history of discrimination beyond dispute, relying heavily on the expert testimony of Dr. F. Arturo Rosales, a professor of history at Arizona State University, who focuses his studies on Mexican Americans in Arizona. (Dist. Court Findings of Fact and Conclusions of Law (Dist. Ct. FOF) at 42-44, *Gonzalez v. Arizona*, No. 2:06-cv-001268-ROS, (D. Ariz., Docket No. 1041, Aug. 20, 2008).)

consisted of "native-born citizens of the United States"—a statute found unconstitutional by this Court. *See Truax v. Raich*, 239 U.S. 33 (1915); (*see also* Dist. Ct. FOF at 43 (citing Testimony of Dr. Rosales, Tr. 361-62)). Moreover, racial segregation and discrimination were prevalent in Arizona schools and in the workforce. (Dist. Ct. FOF at 43 (citing Testimony of Dr. Rosales, Tr. 357-59, 362).)

Arizona's disparate treatment of immigrants and minorities continues to this day and has been the subject of numerous constitutional challenges. Indeed, Proposition 200 was enacted in conjunction with a spate of legislation targeting immigrants, including a statute recently found by this Court to be preempted, in large part, by federal law. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (invalidating portions of S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).[5]

Proposition 200 is part of a long line of legislation targeting Arizona's population of immigrants and minorities—and, as a consequence, its naturalized citizens, who account for 7.4% of Arizona's citizen voting-age population. Manual Pastor & Jared

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[5] Arizona is not alone in its attempts to regulate immigration. Numerous other states have likewise passed legislation that conflicts with federal immigration policy. *See, e.g.* H.B. 56, 2011 Reg. Sess. (Ala. 2011); Senate Enrolled Act No. 590, 117th Sess. (Ind. 2011); A. 69, 119th Sess. (S.C. 2011); H.B. 497, 2011 Gen. Sess., (Utah 2011). *See generally* Brennan Center for Justice, *Election 2012: Voting Laws Roundup* at note 2 (Oct. 16, 2012). *available at* http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/#_edn2 (last visited Jan. 15, 2013) (identifying at least 17 states that have introduced legislation requiring voter registration applicants to provide specified, additional proofs of citizenship to register to vote).

Sanchez, Center for the Study of Immigrant Integration, *Rock the (Naturalized) Vote: the Size and Location of the Recently Naturalized Voting Age Citizen Population* at 13 (Oct. 2012), *available at* http://csii.usc.edu/documents/Naturalization_and_Voting_Age_Population_web.pdf. Almost half of this growing segment of Arizona's population was naturalized after the year 2000. *Id.* at 12.[6] In 2011, 12,784 people in Arizona naturalized and became eligible to vote. U.S. Dep't of Homeland Sec., *Profiles on Naturalized Citizens: 2011*, http://www.dhs.gov/profiles-naturalized-citizens-2011-1 (last visited, Jan. 18, 2013).

Arizona's naturalized citizens are predominantly and increasingly Latino and Asian. Latinos and Asians represent 50.8% and 18.7% of Arizona's naturalized citizens of voting age, respectively. Pastor & Sanchez, *supra*, at 13. These same two groups make up 33.7% of Arizona's general population (Latinos, 30.1%; Asians, 3.6%). U.S. Census Bureau, *American Community Survey*, http://www.census.gov/acs/www/ (last visited, Jan. 14, 2013).

Latinos and Asians are becoming naturalized citizens at an accelerating rate. (Expert Report of Dr. Jorge Chapa, Ph.D. ("Chapa Report"), Table 5 (Jan. 4, 2008) (admitted as Trial Ex. 862).) From 2004 to 2005, naturalization of Latinos increased by 8.3% in contrast to an increase of only 1.4% for

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[6] Specifically, 46.9% were naturalized in the 2000s; 23.3% were naturalized in the 1990s; 12.2% were naturalized in the 1980s; and 17.7% were naturalized before 1980. Pastor & Sanchez, *supra*, at 12.

individuals from non-Hispanic countries.[7] Chapa Report, *supra*, Table 5. Asian Americans also have high naturalization rates, with 57% of the national foreign-born Asian American community becoming naturalized. Asian American Center for Advancing Justice, *A Community of Contrasts* at 13, http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf (last visited, Jan. 14, 2013). From 2006 to 2011, the total Asian population of Arizona grew from 2.3% to 2.7% and, within that population, the number of naturalized foreign-born Asian citizens increased from 17.8% of the State's Asian population to 21.3%. U.S. Census Bureau, *American Community Survey*, http://www.census.gov/acs/www/ (last visited, Jan. 18, 2013).

For these expanding and historically marginalized segments of Arizona's population, Proposition 200 erects significant barriers to participation in the electoral process.

II. PROPOSITION 200 IMPOSES UNIQUE BURDENS ON ARIZONA'S NATURALIZED CITIZENS IN EXERCISING THEIR FUNDAMENTAL RIGHT TO REGISTER TO VOTE.

Proposition 200 requires that Arizona's county recorders "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," which can be shown by only six statutorily prescribed methods. Ariz. Rev. Stat. § 16-166(F). Of these methods of proof, only three are

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[7] Latinos' representation within the naturalized citizen population makes Arizona's naturalized population one of the most Latino-centric in the country, along with Florida's (51.5%), New Mexico's (63.0%), and Texas's (54.4%). Pastor & Sanchez, *supra*, at 13.

realistically available for Arizona's naturalized citizens: *(1)* a presentation to the county recorder of the applicant's U.S. naturalization documents or the number of the certificate of naturalization, *id.* § 16-166(F)(4); *(2)* the number of the applicant's Arizona driver's license or state identification card if issued after October 1, 1996, *id.* § 16-166(F)(1); or *(3)* a photocopy of the applicant's U.S. Passport, *id.* § 16-666(F)(3).[8]

As more fully explained below, and as recognized by the District Court, naturalized citizens face numerous obstacles in satisfying the requirements

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[8] The statute provides additional options that are not available for naturalized citizens. Naturalized citizens will not possess a U.S. birth certificate to satisfy § 16-166(F)(2). (*See* Arizona Secretary of State, Election Procedures Manual at 43 (Oct. 20070) (admitted as Trial Ex. 4).) Only a small number of naturalized citizens will possess a Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number in satisfaction of § 16-166(F)(6).

Section § 16-166(F)(4) allows county recorders to accept out-of-state licenses if the license states "that the person has provided satisfactory proof of United States citizenship." However, this is not a valid option because no state driver's license contains evidence of U.S. citizenship on its face. (*See* Dep. of Karen Osborne, Maricopa County Recorder's Office at 24:15-25:11 (July 31, 2006) (admitted into evidence by stipulation, *Gonzalez v. Arizona*, No. 2:06-cv-001268-ROS (D. Ariz., Docket No. 1009, July 22, 2008)); *see also* Letter from Maricopa County Elections Department to Registrant (Sept. 23, 2005) (admitted as Trial Ex. 210).)

Lastly, although §16-166(F)(5) provides that applicants may present any "[o]ther documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986," this method is likewise not a valid option because that federal statute did not establish any methods of proof of citizenship. Pub. L. No. 99–603, 100 Stat 3359 (Nov. 6, 1986) (codified in scattered sections of Title 8).

of §§ 16-166(F)(1), (3) and (4). (*See* Dist. Ct. FOF at 12, 30 & 36-37 (finding that naturalized citizens may have to apply twice to register to vote, pay a fee to complete the second registration, or register in person at the county recorder's office).) As just one example, an Arizona driver's license will not suffice as proof of citizenship for Arizona residents who obtained their driver's licenses before they became naturalized citizens, while they were legal permanent residents, because a state database code of "F" for "Foreign" is associated with their licenses. In addition, foreign-born individuals who obtain derivative citizenship through, for example, the naturalization of their parents, are not required to apply for a certificate of citizenship. Therefore, their options are even more limited, and they may find themselves without adequate proof of their citizenship under the statute when registering to vote—requiring them to undertake a lengthy and costly process for obtaining the requisite documents to satisfy Proposition 200.

The lead Plaintiffs in this case encountered many of the difficulties that confront naturalized citizens in Arizona when they try to register to vote. For instance, Mr. Jesus Gonzalez is an Arizona resident and naturalized citizen who was repeatedly frustrated in his attempts to register to vote as a result of Proposition 200. Mr. Gonzalez was born in Mexico and has lived in the United States for more than four decades. Immediately after taking an oath of citizenship at a naturalization ceremony, Mr. Gonzalez filled out a voter registration application and provided his certificate of naturalization number as proof of citizenship—as instructed by § 16-166(F)(4) and the voter registration application Mr.

Gonzalez completed. (Dist. Ct. FOF at 17 (citing testimony of Jesus M. Gonzalez, Tr. at 222-223; Deficiency Letter from Krysty Marin, Yuma County Recorder's Office to Jesus Gonzalez (undated) (admitted as Trial Ex. 712)).) But Mr. Gonzalez's application was denied because the State does not have the ability to verify citizenship using that number. (*Id.*) Mr. Gonzalez attempted to register a second time by submitting his Arizona driver's license as proof of citizenship pursuant to § 16-166(F)(1), but this application was also denied as unsatisfactory under Proposition 200. (Dist. Ct. FOF at 18 (citing Testimony of Mr. Gonzalez, Tr. 220-225).)

Unfortunately, Mr. Gonzalez's story is not uncommon. Between January 2005 and September 2007, 11,000 Arizona citizens had to attempt registration under Proposition 200 at least two times before successfully registering to vote. (Dist. Ct. FOF at 14 (citing Testimony of Dr. Louis Lanier, Tr. 329).) All told, more than 31,000 applicants were rejected during this period, (*id.*), and, while 11,000 of them succeeded after repeat attempts, it seems that many, like Mr. Gonzalez, were simply deterred from registering to vote after receiving one or more rejections. Ultimately, 20,000 Arizona residents (approximately 20% of whom are Latinos)[9] were

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[9] Plaintiffs' expert, Dr. Lanier, determined that the effect of voter registration rejections due to Proposition 200 fell disproportionately on Latinos. The representation of Latinos among the rejected applicants under Prop 200 was 2.8% higher than their representation in the total number of registration applicants. (Dist. Ct. FOF at 13 (citing testimony of Dr. Lanier, Ex. 883, Table 2).) Dr. Lanier also concluded that Latinos (like Mr. Gonzalez) were less likely to reregister successfully after

unable to register to vote because of Proposition 200's onerous requirements. The unique obstacles presented by the law effectively relegated this population to second-class citizenship.

A. Presentation of a Certificate of Naturalization or the "Number of the Certificate of Naturalization" Creates Undue Burdens on Naturalized Citizens.

A naturalized citizen may satisfy the proof of citizen requirement by making

> [a] presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

Ariz. Rev. Stat. § 16-166(F)(4). Naturalized citizens often face significant hurdles in "presenting" their naturalization documents to the county recorder. And the alternative of presenting the "number of the certificate of naturalization" is futile because the State cannot use that number to verify citizenship – prompting an automatic rejection of the eligible voter's application and the need for (undeterred) naturalized citizens to submit a subsequent voter registration application with additional information, risking their timely registration.

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having their registration forms rejected pursuant to Prop 200. (Testimony of Dr. Lanier, Tr. at 262:10-263:1.)

1. Proposition 200 Mandates In-Person "Presentation" of Naturalization Documents for Naturalized Citizens.

Unlike native-born citizens who are permitted under Proposition 200 to submit a "photocopy" of their birth certificates to the county recorder, Proposition 200 requires naturalized citizens to "present" a physical copy of their certificates of naturalization to the county recorder. Ariz. Rev. Stat. § 16-166(F)(2), (4).

The Office of the Arizona Secretary of State has consistently interpreted § 16-166F(4) to mean that an original naturalization certificate must be presented in person, as opposed to being mailed. (Testimony of Dr. Joseph Kanefield, Tr. at 699:17-25; 765:20-766:8.) The in-person requirement is consistent with not only the plain language of the statute and the Secretary of State's interpretation, but also federal law—which criminalizes the copying of a naturalization certificate "without lawful authority." 18 U.S.C. § 1426(h) (2006). In fact, the certificate of naturalization itself prominently states in red ink and capital letters: "IT IS PUNISHABLE BY U.S. LAW TO COPY, PRINT OR PHOTOGRAPH THIS CERTIFICATE, WITHOUT LAWFUL AUTHORITY." (Photocopy of Naturalization Certificate for Jesus Maria Gonzalez (admitted as Trial Ex. 711).) Thus, to satisfy § 16-166F(4) with a certificate of naturalization, an applicant must appear before the county recorder in person to present proof of citizenship.

This in-person requirement applies only to naturalized citizens and creates significant hardships. For example, it may be impossible for an applicant to go to the county recorder's office during

the limited hours the office is open.[10] Applicants may have difficulty appearing in the office due to their work schedules and may be unable or unwilling to take time off from work to appear in-person to register (and will lose income if they are hourly wage-earners). Applicants may also experience difficulty travelling to the counties' offices, if, for example, they live in a rural area that is a great distance from the recorder's office and do not have access to a car or an easy means of public transportation.[11]

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[10] Each of Arizona's fifteen county recorder offices keeps different hours. Some maintain regular business hours, 8:00 a.m. – 5:00 p.m. during the week (*e.g.*, Cochise, Greenlee, and Maricopa Counties), while others are closed on certain days (*e.g.*, Apache, Gila, Graham, and La Paz Counties) or maintain satellite offices that are only open for a few hours per week (*e.g.*, Navajo County). *See* Arizona Dep't of State, *County Recorder and Election Offices*, http://www.azsos.gov/election/county.htm (last visited Dec. 27, 2012). None of the county recorder offices is open during evening or weekend hours to accommodate the many individuals who work every weekday during the hours of 8:00 a.m. – 5:00 pm. *Id.*

[11] A naturalization certificate is not the type of document that individuals carry with them and have readily available if they happen to be in the vicinity of the county recorder's office. There is no legal requirement for a naturalized citizen to carry documentary proof of naturalization. (Dep. of Gerri Ratliff, Deputy Assoc. Dir. of the Ariz. National Security and Records Verification Directorate at 87:10-15 (April 22, 2008) (admitted by stipulation, *Gonzalez v. Arizona*, No. 2:06-cv-001268-ROS (D. Ariz., Docket No. 1009, July 22, 2008).) And a certificate of naturalization is "not as easily transportable as a wallet-sized driver's license. Rather, it is an eight-and-one-half by eleven-inch document with an original photograph of the naturalized citizen in the bottom left corner. Naturalized citizens are rarely asked to produce the document, and normally do not carry it on

Despite the express language of Proposition 200, the Secretary of State's interpretation, and the warnings on the face of the certificates that photocopying is illegal, five of fifteen counties in Arizona have an informal practice of accepting photocopies of a naturalization certificate as proof of citizenship. This practice exists even though the counties announce on their websites that "presentation" of the naturalization certificate is required, and officials in those counties testified that they were aware that it is illegal to copy a naturalization certificate without lawful authority. (Dist. Ct. FOF at 31 (citing Dep. of Laura Dean-Lytle, Pinal County Recorder at 53 (Jan. 16, 2008); Dep. of Krysty Marin, Voter Registration Coordinator of Yuma County at 112 (Jan. 18, 2008); Dep. of Karen Osborne, Maricopa County Elections Director at 38-39 (July 1, 2006); Dep. of Patty Hansen, Coconino County Elections Administrator. at 27 (Aug. 1, 2006); and Dep. of F. Ann Rodriquez, Pima County Recorder at 63-64 (Aug. 2, 2006);[12] *see also* Voter Registration Form from Santa Cruz County Website (admitted as Trial Ex. 216); Voter Registration Form from Pinal County Website (admitted as Trial Ex. 219); Voter Registration Form from Maricopa County Website (admitted as Trial Ex. 221).) Indeed, the warnings on the certificates deterred naturalized citizens from submitting photocopies, as reflected by their communication of

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their person." *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825 (N.D. Ohio 2006).

[12] All cited depositions were admitted into evidence by stipulation. (*See* Stipulation to Admit Deposition Designations, *Gonzalez v. Arizona*, No. 2:06-cv-001268-ROS, Docket No. 1009 (D. Ariz., Docket No. 1009, July 22, 2008).)

their concerns to county officials about this prohibited (and potentially criminal) practice. (*See* E-mail from Carmen Waite, Assistant Election Director (Mar. 4, 2005) (admitted as Trial Ex. 291).)

The inconsistent treatment of the "presentment" requirement in and of itself creates a barrier to the registration process that was uniquely experienced by naturalized citizens. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (noting that "unbridled discretion in the hands of a government official or agency" is an "evil[] that will not be tolerated") (quotation and citation omitted).[13]

Moreover, it is significantly more difficult to obtain a duplicate or replacement copy of a certificate of naturalization than is the case for a certified copy of a birth certificate or a driver's license. According to the United States Citizenship and Immigration Service ("USCIS"), it can take up to a year-and-a-half to receive a duplicate copy of a certificate of naturalization. (Osborne Dep. at 47:6-48:3 (July 31, 2006).) During such a long waiting period, there can be as many as eight elections in Arizona and an applicant may miss the deadline to register in time to participate in federal elections. (*Id.*) Likewise, the cost of ordering a replacement certificate is $345, which is far higher than any other acceptable proof of citizenship under Proposition 200.[14] U.S. Dep't of

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[13] *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972) (striking ordinance on vagueness grounds because of state enforcement entity's "unfettered discretion"); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (striking ordinance that granted government official "uncontrolled discretion" over "freedoms which the Constitution guarantees").

[14] A replacement certified birth certificate costs $10.00 in Arizona; a driver's license costs $4.00; and a U.S. passport book

Homeland Sec., Form G-1055, Fee Schedule (revised Nov. 23, 2010) (fee associated with Form N-565), *available at* http://www.uscis.gov/files/form/g-1055.pdf.

2. The Alternative of Providing the "Number of the Certificate of Naturalization" Results in the Automatic Rejection of a Voter Registration Application.

Proposition 200 also provides that naturalized citizens may register to vote by supplying the "number of the certificate of naturalization" on their voter registration forms, subject to the county recorder's ability to verify the certificate number with the federal government. Ariz. Rev. Stat. § 16-166(F)(4).

Following passage of Proposition 200, the Secretary of State updated the State's voter registration form to add a new box 20 on the form that requested the "number of the certificate of naturalization." (Arizona Secretary of State Election Procedures Manual at 47 (Oct. 2007) (admitted as Trial Ex. 4).) However, it is undisputed that the State is, in fact, unable to verify that number. The database the State relies upon to conduct its verification is the USCIS Systematic Alien Verification for Entitlements, or "SAVE" Database, and the SAVE system allows queries only by Alien Registration Numbers, not by a certificate of naturalization number. (*See* Dist. Ct. FOF at 4 (citing testimony of Dr. Kanefield, Tr. at 654); *see also* Ratliff Dep. at 19:16-19, 32:14-19, 43:19-44:4 (Apr. 22, 2008).)

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or card is $100 and $45, respectively. (Dist. Ct. FOF at 8-10 (citing Trial Exhibits 672, 675 and 676).)

The certificate of naturalization number and the Alien Registration Number are not interchangeable. The Alien Registration Number is used by non-citizens to provide information to USCIS while they are under the supervision and control of the federal government. After naturalization, USCIS has no further business with an immigrant, and an individual who naturalizes must turn in his or her Alien Registration Card to USCIS. (Ratliff Dep. at 83:4-6, 88:6-12 (Apr. 22, 2008); Dep. of Michael Quinn, Chief of Record Services at 40:9-13, 45:4-12 (Apr. 22, 2008).)

Accordingly, asking applicants to provide the naturalization certificate number created a system under which county recorders automatically rejected the application of every naturalized citizen who attempted to register to vote by complying with this provision of Proposition 200. After automatically rejecting the application, the county recorder then required applicants like Mr. Gonzalez, who had simply followed the voter registration form in the first place, to apply again and provide different citizenship information. This system not only deterred many eligible voters, but also risked the timeliness of their voter registration for purposes of a particular election because they would not be deemed registered until the subsequent application (if filed) was approved.

3. The State's Post Hoc Attempt To Cure This Faulty System by Requiring Verifiable Alien Registration Numbers Does Not Lift the Unreasonable Burdens on Naturalized Citizens.

Two years after implementing Proposition 200 and while defending against this lawsuit, Arizona sought and received permission from the U.S. Department of

Justice to request that naturalized citizens provide a number *other* than that mandated by Proposition 200 in order to register to vote. However, the current Secretary of State's decision to change the Arizona voter registration form to request the "Alien Registration Number"—which, incidentally, naturalized citizens no longer have any other use for—has not cured the difficulties created by this provision of Proposition 200. (Dist. Ct. FOF at 4; F. Ann Rodriguez Dep. at 60:18:22 (August 2, 2006).)

First, some county recorders continue to request that applicants provide the number of their certificates of naturalization when registering to vote, as is required by the statute. The registration form posted on certain counties' websites asks for a certificate of naturalization number, as do the circulated paper registration forms. (*See, e.g.*, Voter Registration Form from Santa Cruz County Website (admitted as Trial Ex. 216); Voter Registration Form from Pinal County Website (admitted as Trial Ex. 219); Voter Registration Form from Maricopa County Website (admitted as Trial Ex. 221); Greenlee County Recorder's Office Voter Registration website and Voter Registration Form downloaded from it (admitted as Trial Ex. 223); Jasper Altaha Dep. 39:20-40:12 (Jan. 23, 208) (noting that as of January 2008 all paper voter registration forms in Maricopa County requested the "certificate of naturalization" number).) Applicants who follow this instruction will be rejected automatically and put through the double-registration process reserved only for naturalized citizens. The inconsistent enforcement of Proposition 200—with some county recorders insisting on the number specified in the statute, while other counties request a different number later

specified by the Secretary of State—alone infringes upon the fundamental right to vote by placing "unfettered discretion" regarding registration requirements in the hands of local county officials. *See FW/PBS, Inc.*, 493 U.S. at 225; *Papachristou*, 405 U.S. at 168; *Staub*, 355 U.S. at 322.

Second, the plain language of Proposition 200 requires that an applicant provide "the number of the certificate of naturalization," not the Alien Registration Number or any other number that can be found on the naturalization certificate, such as the applicant's date of birth or date of naturalization. The statute does not authorize the Secretary of State or county recorders to request an applicant's Alien Registration Number. As such, no future Secretary of State is bound by the current decision to request the Alien Registration Number.

Third, naturalized citizens encounter difficulties registering to vote even if the State relies upon their purportedly verifiable Alien Registration Numbers. Because of delays in the entry of citizenship information into the USCIS database following naturalization ceremonies, county recorders are unable to confirm citizenship of newly naturalized citizens for two weeks or longer, and the county recorders will reject any application that they cannot verify in SAVE. (Email from Craig Stender to Roberta Abney et al. (Sept. 28, 2005) (admitted as Trial Ex. 304); VRAZ-II County Advisory Committee, Issue 0059-Citizenship-Verification of Naturalization through SAVE (undated) (admitted as Trial Ex. 307); Arizona Secretary of State Election Procedures Manual at 47 (Oct. 2007) (admitted as Trial Ex. 4).)

Recognizing that the federal database may not reflect the U.S. citizenship status of recently

naturalized citizens, the State's Elections Procedures Manual instructs county recorders to advise naturalized citizens that they may have to provide *additional* documentary proof of citizenship when they register to vote if the federal database system cannot confirm their citizenship before the registration deadline for an upcoming election. (Arizona Secretary of State Election Procedures Manual at 47 (Oct. 2007) (admitted as Trial Ex. 4); Rodriguez Dep. at, 36:6-37:13 (Jan. 22, 2008); Marin Dep. at 51:7-9 (Jan. 18, 2008); Osborne Dep. at 48:8-22 (Jan. 14, 2008).) Moreover, some naturalization certificates do not have an Alien Registration Number printed on them, and naturalized citizens may have no other means to obtain this number as they are required to turn in their permanent resident cards before taking the oath of U.S. citizenship pursuant to 8 C.F.R. § 338.3. (*See, e.g.*, Certificate of Naturalization for Herta Antoinette Anita Weber (admitted as Trial Ex. 961); Quinn Dep. at 56:11-15 (April 22, 2008).) Citizens who naturalized before 1975 face particular difficulties because Alien Registration Numbers were neither printed on their certificates of naturalization nor used to track them in the federal immigration service's database; rather, "certificate numbers" were used to track these individuals and these numbers would likely not be found in the Central Index System database used today. (Dist. Ct. FOF at 4 (citing Quinn Dep. at 53:13-54:20 (Apr. 22, 2008)); *see also* Quinn Dep. at 56:16-20, 61:21-63:9, 64:9-16 (April 22, 2008).)

Fourth, the record demonstrates that naturalized citizens may be confused by a county recorder's request for an Alien Registration Number and consequently deterred from re-applying to register to

vote. For example, the reaction of Mr. Gonzalez's wife, a witness in the case who is also a naturalized citizen, to the county recorder's request for an Alien Registration Number was "[t]hat it couldn't be, because I'm already an American citizen, and they were asking me for a document that was irrelevant." (Testimony of Maria Magdelena Gonzalez, Tr. at 213:17-23.) Naturalized citizens are required to surrender their Alien Registration Cards when they naturalize, and they would have no reason to retain the Alien Registration Number for subsequent use.

B. Many Naturalized Citizens Carry "Type F" Driver's Licenses, Which Are Rejected under Proposition 200.

A naturalized citizen may also present "the number of [his or her] driver's license or nonoperating identification license issued after October 1, 1996 by the department of transportation" to satisfy Proposition 200. Ariz. Rev. Stat. § 16-166(F)(1). But this method is not a viable option for Arizona residents who obtained a driver's license before 1996. Nor is it available to naturalized citizens who obtained a license before becoming citizens—which includes a large number of individuals.

Pursuant to an Arizona Motor Vehicle Department (MVD) policy, "noncitizens of the United States that can demonstrate lawful presence in this country are issued a Type F driver license." (Ariz. Office of the Att'y Gen. Op. No. I05-001, Identification Requirements for Voter Registration (Feb. 4, 2005), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/Opinions/2005/I05-001.pdf (admitted as Trial Ex.

138)).[15] Significantly, however, these Type F licenses cannot be used to verify citizenship after the holders of these licenses naturalize and, therefore, Type F licenses cannot satisfy Proposition 200. (*See* Arizona Secretary of State Election Procedures Manual at 47-48 (Oct. 2007) (admitted as Trial Ex. 4) (for Type F licenses, the registrar must confirm citizenship through other means; "if no satisfactory proof of citizenship is provided, the voter registration record should be cancelled and the voter should be contacted within ten business days of receipt of the registration form as provided by A.R.S. § 16-134 with a request to provide proper proof of citizenship.").)

Because driving is an essential part of daily life in Arizona, many immigrants get their driver's licenses before obtaining U.S. citizenship.[16] These initial licenses carry an "F" code in the MVD database. This "F" code, however, is not apparent on the face of the driver's license and does not change even when an individual's citizenship status changes. Rather, all information related to whether a customer has a Type F license is contained in his or her database record and that record is used for all future transactions with the MVD. (Dep. of Cindy Lou Gage, Driver's Program Manager, Ariz. Dep't of Transp. at 17:18-18:6 (Jan. 10, 2008).) The MVD

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[15] *See also* Arizona Dep't of Transp., *New to Arizona?*, http://www.azdot.gov/mvd/azwelcome.asp (last visited Jan. 4, 2013) (describing steps to obtain driver's license for permanent residents).

[16] More than three-quarters of Arizona's working population commute by car to their place of employment. *See* Sperling's Best Places, *Transportation in Arizona*, http://www.bestplaces.net/transportation/state/arizona (last visited Jan. 4, 2013).

does not perform routine updates on customer records that would allow it to identify changes in citizenship status. Nor does renewal of a driver's license automatically trigger an update of an individual's citizenship status or removal of the "F" code associated with the driver's license. (Collins Dep. 20:24-21:2 (Jan. 10, 2008); Gage Dep. 94:7-13 (Jan. 10, 2008).)

In fact, the *only* way for a naturalized citizen who carries a Type F license to get the "F" code removed is to visit the MVD in person with proof of citizenship and to ask for the computer record to be updated to reflect his or her current citizenship status. (Dist. Ct. FOF at 12 (citing Dep. of Ann. Yanofsky, East Central Region Manager, Ariz. Motor Vehicle Dep't at 65-66 (Jan. 10, 2008); Gage Dep. at 90 (Jan. 10, 2008)).) Beyond the obvious burdens associated with having to visit the MVD in person to update a driver's license record to reflect a change in citizenship status, this fix is also unlikely given that individuals holding a Type F license receive no indication that their licenses are inadequate for the purpose of voter registration until their applications to register are rejected. (Yanofsky Dep. at 67:9-12 (Jan. 10, 2008); Gage Dep. at 54:15-25, 90:7-22 (Jan. 10, 2008); Dep. of Donna Collins, Customer Service Identity Specialist, Ariz. Motor Vehicle Dep't at 19:24-20.2 (Jan. 10, 2008).) Indeed, many naturalized citizens become aware of the limitations of the Type F license only when they unsuccessfully attempt to register to vote by using their driver's license numbers—requiring undeterred individuals to attempt to register again using a different proof of citizenship or to appear before the MVD and ask for

a non-Type F license to support a subsequent voter registration application.

C. Most Naturalized Citizens Do Not Hold U.S. Passports, and This Document Is Difficult and Costly To Obtain.

Like all Arizonans seeking to register to vote, a naturalized citizen may also present "a legible photocopy of pertinent pages of [his or her] United States Passport identifying the applicant and the applicant's passport number." Ariz. Rev. Stat. § 16-166(F)(3). As of 2010, however, only 35% of U.S. citizens held U.S. passports. U.S. Dep't of State, *Passport Statistics*, http://travel.state.gov/passport/ppi/stats/stats_890.html (last visited, Jan. 14, 2013) (101,797,872 passports in circulation in 2010); U.S. Census Bureau, *The Foreign-Born Population in the United States: 2010,* at Table 1, http://www.census.gov/prod/2012pubs/acs-19.pdf (last visited, Jan. 14, 2013) (showing 286,870,000 citizens, including native-born and naturalized citizens).

For naturalized citizens, as for all others, passports are difficult and expensive to obtain. A first-time applicant must appear in person at a Passport Application Acceptance Facility or a Regional Passport Center with an application form, provide proof of citizenship and photo identification, pay a $135 fee, and submit a passport-sized photograph. *See* U.S. Dep't of State, *First Time Applicants*, http://travel.state.gov/passport/get/first/first_830.html (last visited, Dec. 28, 2012). Acceptable proof of citizenship for naturalized or derivative citizens includes the in-person presentation of a naturalization certificate or certificate of citizenship. *Id.*

This alternative replicates many of the burdens associated with the other options described above. An in-person appearance is difficult for many new citizens who cannot take off time from work during regular business hours or who risk losing wages for doing so. Moreover, the State Department takes on average 4-6 weeks to process routine passport applications, which may prevent a new citizen from registering in time for an election cycle. *See* U.S. Dep't of State, *Processing Times*, http://travel.state.gov/passport/processing/processing_1740.html (last visited Dec. 27, 2012). Because most naturalized citizens do not hold a U.S. passport and cannot easily obtain one, this option does not remove the unreasonable obstacles Proposition 200 poses to their voter registration.

D. Proposition 200 Leaves Derivative Citizens Without Adequate Means To Register To Vote.

In addition to the burdens imposed on all naturalized citizens, Proposition 200 creates a distinct obstacle for "derivative citizens"—foreign-born minors who become citizens automatically when their parents naturalize or when they are adopted by parents who are American citizens.[17] *See* 8 U.S.C.

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[17] On October 30, 2000, President Clinton signed into law the Child Citizenship Act of 2000, Pub. L. No. 106-396, §§ 101 & 104, which "liberalizes the Immigration and Nationality Act's conditions for the automatic derivative naturalization of alien children of United States-born or naturalized parents. . . . " *Drakes v. Aschcroft*, 323 F.3d 189, 190 (2d Cir. 2003). The law was intended to ease the process by which foreign-born children become citizens and "eliminated the need in many instances for parents to apply to the Immigration and Naturalization Service for Certificate of Citizenship for their children who are not U.S. citizens at birth." Statement of President Clinton on the Child

§ 1431 (2006). *See generally* David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 Ariz. L. Rev. 313, 317 (2005) (describing U.S. law with respect to derivative citizenship, or citizenship *jus sanguinis* (literally, "right of the blood")). Derivative citizens "may, but are not required to, apply for a certificate of citizenship." U.S. Dep't of Homeland Sec., Office of Immigration Statistics, Population Estimates: Estimates of the Legal Permanent Resident Population in 2011, at 2 (July 2012) ("DHS LPR Statistics 2011"), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2011.pdf.

By looking at the number of parents who applied for a separate certificate of citizenship on behalf of their minor children, the Department of Homeland Security, Office of Immigration Statistics, estimates that approximately 1.2 million individuals obtained citizenship derivatively between 1980 and 2011, or approximately 40,000 new derivative citizens nationally each year.[18] DHS LPR Statistics 2011, at 3.

Citizenship Act of 2000, 2000 WL 1618478, at *1 (Oct. 31, 2000).

[18] Ascertaining exactly how many derivative citizens exist is necessarily complicated because derivative citizens need not take any official action to confirm their citizenship. DHS's estimate does not account for those derivative citizens whose parents do not file for certificates of citizenship. In addition, the passage of the Child Citizenship Act, *supra* note 17, "caused a substantial increase in the number of children now eligible for derivative citizenship." Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 Scholar 583, 678 (2012).

For this group, obtaining the documentation required by Proposition 200 upon reaching voting age is not a simple matter. The filing fee for an individual seeking a certificate demonstrating derivative citizenship is $600. U.S. Dep't of Homeland Sec., Form G-1055, Fee Schedule (revised Nov. 23, 2010) (fee associated with form N-600), *available at* http://www.uscis.gov/files/form/g-1055.pdf. This prohibitive cost alone will deter many from applying. Even if this obstacle is surmounted, however, it takes on average six months for USCIS to process an application for a new certificate of citizenship. Immigration Direct, *N-600: Processing* Time, http://kb.immigrationdirect.com/Knowledgebase/N-600-processing-time (last visited, Jan. 4, 2013). Therefore, a young derivative citizen would have to apply for citizenship papers at or before the age of 17 in order to use these papers to register to vote by age 18. Few teenagers have or should be expected to have such forethought.

III. PROPOSITION 200 CONFLICTS WITH THE CENTRAL PURPOSE OF THE NVRA, AS DEMONSTRATED BY ITS IMPACT ON NATURALIZED CITIZENS.

A. Through the NVRA, Congress Intended to Create a Uniform and Non-Discriminatory Mail-in Voter Registration System.

In enacting the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq.* (2006), Congress was reacting to the decades-long history of "restrictive registration laws and administrative procedures" introduced by States "to keep certain groups of citizens from voting." H.R. Rep. No. 103-9, at 2, *reprinted in* 1993 U.S.C.C.A.N. 105, 106 (Feb. 2,

1993).[19] Arizona was one of the states that maintained restrictive measures intended to keep minorities and immigrants out of the ballot box. *See supra* Point I. Arizona's enactment of these discriminatory policies included maintaining literacy and education requirements for voter registration until 1972. (Dist. Ct. FOF at 42 (citing testimony of Dr. Rosales, Tr. 354).)

Congress found these "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(2); *see also* 139 Cong. Rec. S5744-01, S5746 (May 11, 1993) (statement of Sen. Akaka) ("In order to register to vote, individuals must now contend with a variety of local registration laws and procedures that may inhibit voter participation. Enacting uniform national registration procedures is

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[19] These "undesirable" groups included

> in the North, the wave of immigrants pouring into the industrial cities; in the South, blacks and the rural poor. The poll tax, literacy tests, residency requirements, selective purges, elaborate administrative procedures and annual reregistration requirements were some of the techniques developed to discourage participation. These restrictions, along with a weakening of political party competition, were so effective that between 1896 and 1924, the voter turnout for Presidential elections dropped from 79 percent to 49 percent. In the South, the turnout went from 57 percent to 19 percent, with the black vote dropping from 44 percent to essentially zero percent.

Id. at 106.

the most practical way to register eligible voters. By making voter registration more accessible, we would increase the number of registered voters and expand the most fundamental right of all Americans.").

In attempting to remedy this problem, Congress acted to increase the number of citizens who register to vote, and to do so in a manner that ensured the integrity of the electoral process. 42 U.S.C. § 1973gg(b)(1) & (3). Thus, Congress set out to create a registration process that was "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *Id.* § 1973gg-6(b)(1); *see also* H.R. Rep. No. 103-9, at 3, *reprinted in* 1993 U.S.C.C.A.N. at 107 ("The unfinished business of registration reform is to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process.").

One of the three programs created by Congress to fulfill this legislative purpose was a uniform mail-in registration system, which required all states to "accept and use the mail voter registration application form prescribed by the Federal Election Commission . . . for the registration of voters in elections for Federal office."[20] 42 U.S.C. § 1973gg-4(a)(1). This program was intended "[t]o increase registration of eligible citizens." S. Rep. No. 103-6, at

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[20] The duties of the "Federal Election Commission" were later transferred to the Election Assistance Commission (EAC), 42 U.S.C. § 15322 (2006). In addition to the mail-in registration program, Congress created what has been popularly referred to as the "motor-voter program," requiring states to register voters simultaneously at the time they apply for a driver's license, 42 U.S.C. § 1973gg-3, and an agency registration program, whereby states were required to designate all public assistance and disability assistance agencies to be available for voter registration, *id.* § 1973gg-5.

1-2, *reprinted in* 1993 WL 54278, at *1 (Feb. 25, 1993).

B. Proposition 200 Creates a Discriminatory and Non-Uniform Voter Registration System That Places Distinct Burdens on Naturalized Citizens.

By imposing unique and onerous difficulties on naturalized citizens who seek to register to vote, Proposition 200 conflicts with the express intention of Congress in passing the NVRA. Fundamentally, Arizona has enacted precisely the type of "restrictive registration law" that Congress was explicitly combating in the NVRA. H.R. Rep. No. 103-9, at 2, *reprinted in* 1993 U.S.C.C.A.N. at 106. As one district court has already observed, procedures that discriminate against naturalized citizens stand in direct conflict with the NVRA's command for voter registration that is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *See United States v. Florida,* 870 F. Supp. 2d 1346, 1350, (S.D. Fla. June 28, 2012) (holding Florida's methods for purging non-citizens from registration rolls in violation of § 1973gg-6 because it "made it likely that the properly registered citizens who would be required to respond and provide documentation would be primarily newly naturalized citizens. The program was likely to have a discriminatory impact on these new citizens. And while the Secretary suggests that having to respond to this kind of inquiry is of little import, that is not so. A state cannot properly impose burdensome demands in a discriminatory manner.").

In addition, Proposition 200's effect on naturalized citizens demonstrates its interference with the NVRA's goal of establishing a uniform mail-in registration system. Congress rejected language

approving states' ability to request proof of citizenship for this precise reason. In approving the version of the NVRA eventually passed, the Conference Committee of the House and Senate rejected a proof-of-citizenship provision, observing:

> The conferees agree with the House bill and do not include this provision from the Senate amendment. It is not necessary or consistent with the purposes of this Act. *Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act.* . . . These concerns lead the conferees to conclude that this section should be deleted.

H.R. Conf. Rep. No. 103-66, at 23-24, *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49 (Apr. 28, 1993) (emphasis added). After the Conference Committee issued its report, a group of Representatives in the House sought to recommit the bill because the Committee had deleted the proof-of-citizenship provision. 139 Cong. Rec. H2264-03, H2273 (May 5, 1993). The motion was soundly defeated and the Conference Committee's version of the bill approved. *Id.* at H2275-76.[21]

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[21] *See Gonzalez v. Arizona*, 677 F.3d 383, 441 (9th Cir. 2012) (Kozinski, J., concurring) ("[T]he history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists. The Court has recognized that such drafting history *can* offer interpretive insight: 'Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.'") (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006)).

Congress was prescient in observing that states might rely on a proof-of-citizenship requirement effectively to eliminate the mail as a means for a naturalized citizen to register. Through Proposition 200, Arizona has done just this. The only way for a naturalized citizen (who doesn't have a U.S. passport) to register successfully in his or her first attempt is to present, *in person*, an original certificate of naturalization. If, instead, a naturalized citizen hazards the use of a mail-in registration form, his or her application is likely to be rejected. In many cases, the numbers such an applicant fills in on the mail-in form simply will not work: certificate of naturalization numbers are not verifiable; Alien Registration Numbers are not authorized under the statute, are not generally accepted, and are not a reliable means of verifying citizenship for newly naturalized citizens or those who were naturalized before 1975; and a driver's license number is not a viable option for a naturalized citizen who obtained the license before 1996 or before becoming a citizen.

The NVRA was enacted to create a uniform mail-in registration system. Because Proposition 200 erects a significant barrier to achieving this goal, it is preempted.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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Appendix

APPENDIX:

LIST OF AMICI CURIAE

Asian & Pacific Islander American Vote (APIAVote) is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. APIAVote envisions a society in which all Asian Pacific Islander Americans fully participate in and have access to the democratic process. As such, APIAVote has a long-standing interest in voting rights and protecting the rights of Asian Americans and Pacific Islanders to access the polls. This interest has resulted in APIAVote's Congressional testimony against restrictive proof of citizenship and identification requirements and participation in a number of amicus briefs before the courts on the issue.

The **Asian American Bar Association of the Greater Bay Area (AABA)** represents the interests of Asian Pacific American attorneys in the Greater San Francisco Bay Area. It is one of the largest Asian Pacific American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, AABA has been actively involved in civil rights issues and has advocated on issues regarding minority communities, diversity, and equal protection. Among other things, AABA filed an amicus brief in the *Bakke* affirmative action case in the United States Supreme Court in 1977 and in *In re Marriage Cases* in the California Supreme Court in 2007.

Asian American Institute (AAI) is a pan-Asian, non-partisan, not-for-profit organization located in

Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination and other challenges that immigrants face, including laws or policies that disproportionately impact and hinder eligible citizens' ability to exercise their fundamental right to vote. Accordingly, AAI has a strong interest in this case.

Asian American Justice Center (AAJC) is a national nonprofit, nonpartisan organization based in Washington, D.C. AAJC is a member of the Asian American Center for Advancing Justice, whose other members are Asian American Institute, Asian Law Caucus, and Asian Pacific American Legal Center. Founded in 1991, AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC strives to promote civic engagement, forge strong and safe communities, and create an inclusive society in communities on a local, regional, and national level. A nationally recognized voice on behalf of Asian Americans, AAJC focuses its expertise on voting rights, anti-Asian violence prevention/race relations, census issues, immigrant rights, language access, and affirmative action. AAJC has maintained a strong interest in the voting rights of Asian Americans and strives to protect Asian Americans'

access to the polls. AAJC has supported efforts to increase access to voter registration, including working on the successful passage of the National Voter Registration Act of 1993. Such long-standing interest has resulted in AAJC's participation in a number of amicus briefs before the courts regarding voting rights and on this particular issue.

The **Asian Law Alliance (ALA)**, founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. Through our Voting Rights and Education project, ALA has monitored the implementation of Section 203 of the Voting Rights Act since 1998.

Established in 1972, the **Asian Law Caucus (ALC)** is the country's oldest civil rights and public interest legal organization serving the Asian Pacific American community. ALC is dedicated to the pursuit of equality and justice for all sectors of society. ALC represents primarily low-income, monolingual, or limited English proficient Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, and civil rights. Through our Voting Rights project, ALC works to ensure the full participation of all eligible voters in the electoral process.

Founded in 1983, the **Asian Pacific American Legal Center of Southern California (APALC)**, a member of the Asian American Center for Advancing Justice, is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy,

community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. APALC's civil rights litigation has covered a broad range of issues such as race and national origin discrimination, access to education, immigration and naturalization, language rights, garment worker rights and other low-wage worker exploitation. APALC has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

The **Asian Pacific American Network of Oregon (APANO)** is a statewide, grassroots organization, uniting Asians and Pacific Islanders to achieve social justice. We envision a just and equitable world where Asians and Pacific Islanders are fully engaged in the social, economic and political issues that affect us. APANO has worked for over 15 years engaging Asian and Pacific Islander citizens in the electoral process, providing language access and increasing opportunities for civic participation. Arizona's Proposition 200 is inconsistent with federal requirements, adding additional burdens for citizens in the democratic process and further impacting Asian and Pacific Islander communities who currently experience significant disparities in voter participation.

Asian Services in Action, Inc. (ASIA) is a nonprofit health and human services agency in Ohio dedicated to empowering and advocating for Asian Americans/Pacific Islanders (AAPIs) and to providing AAPIs access to quality, culturally, and linguistically appropriate information and services. Incorporated in 1995, ASIA serves over 10,000 individuals

annually, the majority of whom are immigrants and refugees from Asia, through legal assistance, social services, vocational training, and issue advocacy. ASIA believes that Proposition 200 places undue burdens on, and chills civic engagement among, voter registrants and voters who are naturalized citizens. In the course of conducting a nonpartisan, statewide Voter Registration and Education Project in 2012, ASIA and its partners witnessed firsthand how limited English proficiency and unfamiliarity with American civic institutions created high barriers for AAPI naturalized citizens who wished to vote, both during voter registration and at the polls. ASIA staff and volunteers prevented several such citizens from being wrongfully turned away from the polls due to simple misunderstandings on Election Day. Given the negligible national rate of proven voter fraud, ASIA believes that proof of citizenship laws unnecessarily hamper naturalized citizens from participating in our democracy.

Association of Asian Pacific Community Health Organizations (AAPCHO) is a national association of community health organizations serving medically underserved Asian Americans, Native Hawaiians, and other Pacific Islanders. AAPCHO is dedicated to promoting advocacy, collaboration, leadership, access, and civic participation to improve the health status of these groups. As a unified voice of its membership, AAPCHO shares its collective knowledge and experiences with policy makers at the national, state, and local levels. In addition, AAPCHO and its member centers seek to improve the integration and engagement of community health centers and their patients in the electoral process.

Center for Asian Pacific American Women is a national organization dedicated to building leadership capacity in our communities. The intention of the National Voter Registration Act was to encourage greater access to voter registration for our citizens. The NVRA increased the opportunity for our citizens to engage in our communities. Proposition 200 places yet another obstacle in the expansion of civic participation and leadership.

Center for Pan Asian Community Services, Inc. (CPACS) is a private nonprofit located in Atlanta, Georgia. Our mission is to promote self-sufficiency and equity for immigrants, refugees, and the underprivileged through comprehensive health and social services, capacity building, and advocacy. CPACS has sponsored numerous events and provided community services such as voter registration drives, polling site assistance, exit polling, voter education, etc. during the most recent election cycle. CPACS supports the protection and advancement of the voting rights of Asian and Pacific Islander Americans.

Chinese for Affirmative Action (CAA) was founded in 1969 to protect the civil and political rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. CAA advocates for systemic change that protects immigrant rights. promotes language diversity, and remedies racial injustice.

Founded in 1972, the **Chinese Progressive Association (CPA)** educates, organizes and empowers the low-income and working class immigrant Chinese community in San Francisco to build

collective power with other oppressed communities to demand better living and working conditions and justice for all people. As part of the CPA's Political Empowerment Campaign, CPA has trained and developed dozens of new grassroots leaders and reached thousands of Chinese immigrant voters.

Founded in 1973, **Filipino Advocates for Justice (FAJ)** is an advocate for immigrant and civil rights for the Filipino community and serves the more vulnerable in our community by helping recent arrivals, youth and low wage workers navigate the challenges and hurdles of life in the US. FAJ seeks to build a strong and empowered Filipino community by organizing constituents, developing leaders, providing services, and advocating for policies that promote social and economic justice and equity for all.

Hispanic Federation provides grants to a broad network of Latino nonprofit agencies serving the most vulnerable members of the Hispanic community and advocates nationally with respect to the vital issues of education, health, immigration, economic empowerment, civic engagement, and the environment.

Hispanic National Bar Association (HNBA) is a nonprofit, nonpartisan, national professional association that represents the interests of over 100,000 attorneys, judges, law professors, legal assistants, and law students of Hispanic descent in the United States and its territories. The HNBA has thirty-eight affiliated bars in various states across the country. The continuing mission of the HNBA is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession.

Since its inception 40 years ago, the HNBA has served as the national voice for Hispanics in the legal profession and has promoted justice, equity, and opportunity for Hispanics.

Japanese American Citizens League (JACL) was founded in 1929. It is the oldest and largest Asian American civil rights organization in the United States. JACL has over 10,000 members and 110 chapters throughout the Nation, including Arizona. The JACL was a leading organization in removing state alien land laws and in securing redress for Japanese Americans imprisoned during World War II. The JACL also has a long history of advocacy in issues relating to immigration, naturalization, and voting rights.

Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 2.2 million Latino trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. It has worked to secure the voting rights and political participation of Latino voters since 1972 when it initiated a series of suits to create bilingual voting systems throughout the United States.

National Asian Pacific American Bar Association (NAPABA) is the national association of Asian

Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and more than 60 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. NAPABA engages in civil rights advocacy on various fronts and has a particular interest in ensuring that all naturalized citizens are afforded the opportunity to vote and therefore opposes restrictive voter registration laws.

National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander (API) women's organization in the country, with offices in Washington D.C., New York, and Oakland, and eleven chapters throughout the United States. NAPAWF's mission is to build a movement to advance social justice and human rights for API women and girls. Since its founding, NAPAWF has supported and advocated for public policies that advance civil rights, economic opportunity, educational access, health and reproductive justice, immigrant and refugee rights, and efforts to end violence against women and girls. Barriers to voting pose a significant obstacle to the full range of civil rights for API women. NAPAWF strongly supports this effort to ensure that all citizens have a meaningful right to vote.

National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is

the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituents include the more than 6,000 Latino elected and appointed officials nationwide who serve on bodies including local and state school boards, municipal councils, state legislatures, and the U.S. Congress. For several decades, the NALEO Educational Fund has worked to mobilize eligible Latinos to register and vote, and to build integrated national and local Latino voter education and participation programs, because our nation's growing Latino electorate must be fully engaged in order to ensure the sustained strength of our democracy. In particular, we advocate voter registration procedures that encourage the broadest possible involvement in elections of new and historically under-represented Americans.

National Institute for Latino Policy is a nonpartisan policy center established in 1982 that focuses on Latino policy issues. Among our concerns are the rights of immigrants in the United States and the promotion of full civic participation by the Latino community. The policies of the State of Arizona in placing unique obstacles on immigrants in their ability to vote represents a major act of discrimination that results in the disenfranchisement of a disproportionate number of persons from this class. We oppose such policies.

National Organization for Mexican American Rights, Inc. (NOMAR, Inc.), a national nonprofit organization with the mission to protect the civil rights of Hispanic Americans and to promote equal opportunity for Hispanic Americans in employment and education, supports the respondents in the above

mentioned case before the Supreme Court of the United States. A critical mission of NOMAR, Inc. is to protect the civil rights of Hispanic Americans, which include the fundamental right of all United States citizens to vote. We believe that this right extends to all citizens whether born in the United States, or naturalized after migrating to the United States. We believe that the state of Arizona, through Proposition 200, passed in 2004, has instituted a voter registration process that discriminates against Latino and Asian naturalized citizens by imposing unreasonable and essentially unachievable requirements to prove citizenship that effectively deny them their right to vote. We believe that this law violates the intent of the National Voter Registration Act of 1993 ("NVRA") and that the voter registration requirements of Proposition 200 directly conflict with the NVRA's command for voter registration that is uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965. We believe that these requirements are intended to suppress the voting rights of Latinos and Asians, and is based on a xenophobic bias against Latinos and Asians. Therefore, NOMAR, Inc. fully supports the respondents' position that this law is unconstitutional.

OneAmerica was formed directly after September 11, 2001, in response to the hate crimes and discrimination against immigrant communities. Its mission is to advance the fundamental principles of democracy, justice, and human rights at the local, state and national levels. OneAmerica works with community partners to protect and strengthen fundamental American rights for all people, especially immigrants. OneAmerica has become a

leading voice in shaping policies that directly impact Washington State's immigrant communities, including policies and practices that assist immigrants on their path to citizenship and ensure their full civic engagement.

South Asian Americans Leading Together (SAALT) is a national nonprofit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that is committed to the importance of civic engagement and addressing societal disparities that have historically and currently affected the South Asian community and other immigrant communities, SAALT joins this brief as Proposition 200 disparately impacts naturalized citizens in their fundamental right to register to vote.

The **South Asian Bar Association of Northern California (SABA-NC)** was founded in 1993 to ensure that Bay Area South Asian lawyers were provided an avenue to develop professionally, network among peers and volunteer within the South Asian community. SABA-NC supports and hosts fundraisers for South Asian community support, and social service organizations, and facilitates pro bono legal services to those in need. SABA-NC has supported and participated in voter registration drives and voter protection poll monitoring projects.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., and JESUS M. GONZALEZ, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in approximately 800 communities and in every state.

For more than 90 years, the League has worked to protect every American citizen's right to vote. As part of its mission, the League operates one of the longest-running and largest nonpartisan voter registration efforts in the nation. Moreover, the League has been a leader in seeking to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. To that end, the League has historically endorsed the adoption of simple, uniform voter registration forms that can be submitted through the mail without additional documentary requirements. Mail voter registration has long played a significant role in the League's voter registration drives and served as one

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of the organization's primary tools for bolstering democratic participation. Accordingly, the League strongly supported the enactment and enforcement of the National Voter Registration Act of 1993, which aimed to increase the number of eligible citizens who register to vote by providing for standardized, non-discriminatory voter registration procedures.

The League's continuous involvement in the instant case reflects the organization's continuing commitment to its founding goals and to maintaining the integrity of the National Voter Registration Act. When this case was first appealed to the Ninth Circuit, the League filed an amicus brief arguing that Arizona cannot require documentary proof of citizenship as a condition for accepting the federal mail voter registration form. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (No. 06-16521). When the case returned to the Ninth Circuit, the League again sought to protect mail registration from debilitating restrictions. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) (No. 08-17094). Subsequently, following the Ninth Circuit's original panel decision, the League filed a third amicus brief, this time urging the court to deny rehearing en banc. Brief for the League of Women Voters as Amicus Curiae Supporting Respondents' Opposition to Appellee's Petition for Rehearing En Banc, *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (No. 08-17094). The League is filing this brief in support of Respondents in order to

ensure the viability of voter registration by mail and in furtherance of the League's mission to increase participation in the democratic process.

SUMMARY OF ARGUMENT

1. The Ninth Circuit, sitting en banc, correctly concluded that that the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, preempts the documentary proof-of-citizenship registration requirement in Arizona's Proposition 200.[2] As that court recognized, one of the NVRA's primary purposes was to increase participation in federal elections by overriding burdensome state registration laws. Specifically, by mandating that states "accept and use" a standard mail voter registration application (the "Federal Form"), Congress sought to establish a single, uniform set of voter registration application requirements for federal elections that would operate independently of state law. This purpose, which is reflected in the NVRA's text and legislative history, is the driving force behind the mail voter registration provisions at issue and must color any interpretation of the statute.

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[2] Proposition 200 requires that an Arizona "county recorder shall *reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship" and lists the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. § 16-166(F) (emphasis added).

2. Congress delegated authority to the Election Assistance Commission ("EAC")[3] to develop and administer the Federal Form. Exercising this authority, the EAC engaged in formal notice-and-comment rulemaking pursuant to the Administrative Procedure Act and determined that an attestation of citizenship under penalty of perjury was sufficient to prevent voter fraud. In reaching this decision, the agency concluded that requiring documentary proof of citizenship would violate the NVRA's mandate that the Federal Form "may require *only*" such identifying information as is "*necessary* to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Under *Chevron*, this Court must defer to the EAC's interpretation of what information is "necessary" under the NVRA. The EAC is the agency solely designated by Congress to interpret the NVRA and has codified its view rejecting a documentary proof-of-citizenship requirement in the Code of Federal Regulations, thereby giving its decision the force of law.

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[3] The Federal Election Commission ("FEC") was originally responsible for implementing the mail voter registration provisions of the NVRA. Following the passage of the Help America Vote Act of 2002 ("HAVA"), however, all responsibilities entrusted to the FEC under the NVRA were transferred to the EAC. 42 U.S.C. § 15532. In light of this complete transfer of responsibility, the actions, decisions, and interpretations of the FEC pertaining to the NVRA are imputed to the EAC. This brief thus uses "EAC" to refer to both the FEC and EAC.

3. The EAC's interpretation of the NVRA is controlling under *Chevron* regardless of whether this Court applies a preemption analysis under the Elections Clause or the Supremacy Clause. Although the Ninth Circuit correctly reasoned that history and this Court's precedent dictate that preemption under the Elections Clause operates differently than under the Supremacy Clause, this distinction is of no import with respect to *Chevron* principles. Even under traditional Supremacy Clause principles, Congress clearly intended for the Federal Form to operate independently of state voter registration requirements and delegated authority to the EAC to regulate accordingly. In light of this delegation, the agency's stance that the NVRA preempts Proposition 200's documentary proof-of-citizenship requirement must be taken as conclusive.

ARGUMENT

I. Congress Intended for the NVRA to Preempt State Law and Rejected the Inclusion of a Requirement for Documentary Proof-of-Citizenship on the Federal Form.

Because the NVRA was primarily intended to increase the ease with which citizens could register to vote in federal elections, the League strongly advocated for and participated in the negotiations surrounding the NVRA's passage in 1993. Exercising its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, Congress passed the NVRA in part to address what it perceived as improper barriers to voter registration embedded in state law. As the statute itself acknowledged,

"discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3). In its long history of promoting voter registration efforts, the League has experienced many of these unfair registration laws and procedures firsthand. Thus, amicus is in full agreement with the NVRA's stated goals of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office" and implementing procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(1), (2).

One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions for voters. The centerpiece of these new provisions was the creation of a standardized mail voter registration form that could be utilized by the citizens of any state to register for federal elections. *Id.* § 1973gg-4. By creating a standardized registration form that "[e]ach State shall accept and use," *id.* § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.[4]

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[4] Although the NVRA also permits states to "develop and use" their own forms, § 1973gg-4(a)(2), the implementation of the

The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. *See id.* § 1973gg-4(b) (mandating that state officials make the standardized mail registration form available to "governmental and private entities, with particular emphasis on making them available for organized voter registration programs"). Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. *Gonzalez v. Arizona*, 677 F.3d 383, 401 (9th Cir. 2012) (en banc). Rather, the development and implementation of the Federal Form was a task delegated exclusively to a federal agency – the EAC.

Federal Form was the true heart of the statute's mail provisions. As the Department of Justice has acknowledged, "[t]he principal purpose of [the NVRA] was to require that the states provide prospective voters with uniform and convenient means by which to register for the federal franchise." Craig C. Donsanto & Nancy L. Simmons, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 55-56 (7th ed. 2007), *available at* http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf; *see also id.* at 63 ("The major purpose of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail."); *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").

The EAC was not without guidance from Congress about how to develop and implement the Federal Form. In particular, the EAC knew exactly how Congress felt about the inclusion of a documentary proof-of-citizenship requirement for the Federal Form. *Gonzalez*, 677 F.3d at 440-42 (Kozinski, J., concurring). As the legislative history reveals, during congressional deliberations on the NVRA, the Senate passed an amendment to the bill providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993). Senator Simpson, who sponsored the amendment, stated that the amendment was necessary because "allow[ing] States to check documents to verify citizenship" would provide a safeguard against fraudulent voting practices. *Id.* (statement of Sen. Simpson).

The House version of the bill, however, did not include this amendment, and in reconciling the two versions, the Conference Committee ultimately rejected the Senate amendment. In its report, the Committee explained its decision: "[The amendment] is *not necessary or consistent with the purposes of this Act.* Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could *effectively eliminate, or seriously interfere with, the mail registration program* of the Act." H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (emphasis added).

After the bill was reported out of conference, its House opponents moved to recommit the bill to the Committee on House Administration, specifically to direct the Committee to reinsert the Senate amendment permitting states to require documentary proof of citizenship. That motion was defeated, 259 to 164. *See* 139 Cong. Rec. 9219, 9231-32 (1993). Thus, the final version of the NVRA passed by both Houses of Congress did not include any provision permitting states to require documentary proof of citizenship.

In passing the NVRA with only an attestation-of-citizenship requirement, Congress was well aware that states would be prohibited from requiring additional documentation. As the Senate minority emphasized, the bill was understood to effectively "eliminat[e] . . . state verification requirements with [its] mail-in applications." S. Rep. No. 101-140, at 38 (1989). Arguing that this created federalism concerns, the minority proceeded to list a number of state requirements that would be preempted by the NVRA, *id.* at 38-40, and quoted a letter from the Department of Justice highlighting that the federal mail registration form included no "procedures for independently confirming the information provided." *Id.* at 47. Squarely presented with concerns about states' ability to impose documentary proof requirements, Congress nevertheless passed the bill in a form that maximized the ease of registration.

Accordingly, the NVRA's "text, context, purpose, and . . . drafting history all point in the same direction." *United States v. Hayes*, 555 U.S. 415, 429

(2009). Congress did not intend for states to add their own registration requirements to the Federal Form. Reading the statute's command that every state "shall accept and use" the Federal Form as anything other than an imperative would effectively override Congress's deliberate exclusion of a documentary proof-of-citizenship requirement from the statute. Adopting Petitioner's position would also undermine the driving principles behind the statute's mail voter registration provisions. Indeed, it would be counterintuitive if the very mechanism for circumventing burdensome state registration requirements was itself subject to them. The Ninth Circuit recognized this truism in holding that "the NVRA does not give states room to add their own requirements to the Federal Form," and this Court should adopt the same conclusion. *Gonzalez*, 677 F.3d at 401.

II. The EAC's Determination That Documentary Proof of Citizenship Is Not Necessary for the Federal Form is a Valid Exercise of Delegated Power and Entitled to Deference Under *Chevron*.

In the NVRA, Congress mandated that states must "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). However, Congress did not dictate exactly what the Federal Form should look like. Instead, it delegated the task of developing and implementing the Federal Form to the EAC. Consistent with long-standing principles of administrative law, this Court is required to defer to the EAC's reasonable interpretation of the NVRA

and its determination that no documentary proof-of-citizenship requirement is necessary for voter registration.

1. The EAC is uniquely positioned to interpret the NVRA, and specifically, its mail voter registration provisions. As explained above, a standardized mail voter registration form was one of the centerpieces of the NVRA. The contents of this new Federal Form, however, were not explicitly defined in the statute. Rather, the NVRA directed the EAC to "develop a mail voter registration application form for elections for Federal office" by "prescrib[ing] . . . regulations." 42 U.S.C. § 1973gg-7(a)(2), (1). This delegation of power, while broad, was accompanied by several limitations.

First, the EAC could "require only such identifying information . . . as [wa]s necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 1973gg-7(b)(1). Second, the Federal Form was required to specify "each eligibility requirement (including citizenship)." *Id.* § 1973gg-7(b)(2)(A). Third, the form was required to contain "an attestation that the applicant meets each such requirement." *Id.* § 1973gg-7(b)(2)(B). Fourth, the form must "require[] the signature of the applicant, under penalty of perjury." *Id.* § 1973gg-7(b)(2)(C). Fifth, the form must list the "penalties provided by law for submission of a false voter registration application." *Id.* §§ 1973gg-6(a)(5)(B), 1973gg-7(b)(4)(i). And finally, the statute dictated that the

Federal Form could "not include any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3).

Following the NVRA's enactment, the EAC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form in accordance with the statute's goals and mandates. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). While this rulemaking was ongoing, the EAC released a guide containing its preliminary views to assist states in implementing the NVRA. In this guide, the agency noted that it was constrained by the statute to *only* request identifying information "necessary to . . . assess the eligibility of the applicant," and was therefore prohibited from asking for superfluous data such as an applicant's race, gender, or weight. Nat'l Clearinghouse on Election Admin., Fed. Election Comm'n, *Implementing the National Voter Registration Act of 1993* at 3-2, 3-3 (1994) (quoting 42 U.S.C. § 1973gg-7(b)(1)), *available at* http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf. Based on this interpretation, the EAC declared that the Form was required to include an attestation of citizenship, but made no mention of documentary proof. *Id.* at 3-4. This omission was not a fluke – the three sample mail registration forms that the EAC composed and included in the

guide explicitly required an attestation and nothing more.[5] *Id.* at 3-10, 3-11, 3-13.

Once rulemaking was complete, the EAC did not deviate from its initial views. After consulting with state officials and referring to public comments, the agency developed a single-sheet registration form that an applicant could simply fill out, stamp, and mail as a postcard. *See* 11 C.F.R. § 9428.5. This design choice for postcard registration reflected three important conclusions reached by the EAC. First, by making the Federal Form a postcard, the EAC conveyed that the "necessary" information to determine voter eligibility could be contained on a single sheet of paper, and that further documentation was not required under the NVRA. *Implementing the National Voter Registration Act* at 3-4. Second, the design reflected the agency's belief that the risk of voter fraud was sufficiently mitigated

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[5] Petitioner portrays the EAC's guide as permitting states to reject a voter registration application if it fails to meet any state registration requirement. Pet'r's Br. 36-37. But this is not the case. In a preliminary section of the guide, the EAC clarified that an application received by state officials may be subject to "whatever verification procedures are currently applied to all applications." *Implementing the National Voter Registration Act* at 1-6. Allowing states to utilize verification *procedures* after a complete application is accepted, however, is far different than permitting states to impose burdensome requirements during the application process. Moreover, in the section of the guide discussing the Federal Form, the EAC made clear its view that the NVRA "*requires* States to accept and use what amounts to a national voter registration form." *Id.* at 3-1 (emphasis added).

by requiring an applicant to attest under penalty of perjury that she meets the state's eligibility requirements, and that the information provided is true. 11 C.F.R. § 9428.4(b). Third, the postcard format signaled the EAC's commitment to facilitating voter registration drives by national organizations, such as the League. *See* 42 U.S.C. § 1973gg-4(b).

Although the Federal Form has undergone minor revisions in recent years, its postcard format and attestation requirement have remained unchanged. The significance of this consistency is underscored by the fact that both Congress and the EAC could have chosen to change the Federal Form when the Help American Vote Act ("HAVA") was passed in 2002. HAVA presented an opportunity to modify the form to require more information from applicants. But instead of demanding any sort of documentation, Congress merely added one mandatory question asking the applicant to check a box affirming that she is a United States citizen.[6] 42 U.S.C. § 15483(b)(4)(A)(i). In implementing HAVA's directives, the EAC similarly refused to exercise its broad authority to change the content or format of

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[6] Other HAVA provisions established new procedures for states to "verify" the eligibility of voter registration applicants after their completed applications were received, 42 U.S.C. § 15483(a)(5)(B)(i), and set ID requirements at the polls for certain persons who registered to vote "by mail." *Id.* § 15483(b)(1)(A), (B). However, there was no change made to the Federal Form other than the addition of the check box.

the Federal Form, adding the new check box and nothing more.

2. Over the past eighteen years, the EAC has consistently reiterated that documentary proof of citizenship is not "necessary . . . to assess the eligibility of the applicant" under the NVRA. 42 U.S.C. § 1973gg-7(b)(1). The agency's preliminary views, its final version of the Federal Form, and its implementation of HAVA all reflect this stance by requiring only an attestation of citizenship on the postcard form. *Implementing the National Voter Registration Act* at 3-2, 3-4; 11 C.F.R. § 9428.4(b)(2). Thus, when specifically asked by Arizona's Secretary of State whether Proposition 200 was consistent with the NVRA, the EAC had no difficulty concluding that it was not. *See* Letter from Thomas R. Wilkey, Executive Director, U.S. Election Assistance Comm'n to Jan Brewer, Arizona Secretary of State (March 6, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf.

In a letter to Arizona's Secretary of State in March 2006, the EAC emphasized that it was the sole entity charged with "creating and regulating the Federal Form," and in this capacity, it had decided that documentary proof-of-citizenship was not necessary under the NVRA. *Id.* Because the agency had already "set[] the proof required to demonstrate voter qualification," the EAC concluded that any effort by Arizona to "condition acceptance of the Federal Form upon receipt of additional proof" was

preempted. *Id.*; *see Gonzalez*, 677 F.3d at 399 (explaining that the NVRA preempts Proposition 200 because the latter's "registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form").

Moreover, following the March 2006 letter, the EAC commissioners twice voted on proposals to amend the Federal Form to accommodate Arizona's Proposition 200. Election Assistance Comm'n, Tally Vote In the Matter of Arizona Request for Accommodation (July 31, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF; Election Assistance Comm'n, Public Meeting (Mar. 20, 2008), *available at* http://www.eac.gov/assets/1/Events/minutes%20public%20meeting%20march%2020%202008.pdf. In both instances, the vote failed, resulting in no modification of the agency's position. As Commissioner Ray Martinez, III explained, the EAC has "established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from our predecessor agency, the Federal Election Commission." Ray Martinez III, Commissioner, Election Assistance Comm'n, Position Statement on EAC Tally Vote Dated July 6, 2006: "Arizona's Request for Accommodation" at 5 (July 10, 2006), *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona's%20Request%20for%20Accomodation.pdf. Under this

precedent – which remains intact – the "language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls." *Id.* (quoting Letter from Gavin Gilmour, Associate General Counsel, Election Assistance Comm'n to Dawn Roberts, Director, Division of Elections, Florida Dept. of State (July 26, 2005), LWV App. 6a).

3. Under the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the EAC's interpretation of the NVRA to preclude a state from adding a documentary proof-of-citizenship requirement to the Federal Form is entitled to deference. In *Chevron*, the Supreme Court "held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Filling these gaps "involves difficult policy choices that agencies are better equipped to make than courts," and as such, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* (citing *Chevron*, 467 U.S. at 843-44 & n.11, 865-66).

Deference is required regardless of whether the agency's interpretation conflicts with state law; as long as the "agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,

[courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (viewing agency understanding of preemptive effect of regulations as "dispositive").

Viewing the instant case in light of *Chevron*, the EAC interpreted the NVRA as permitting it to request only "necessary" identifying information. 42 U.S.C. § 1973gg-7(b)(1). Building upon this interpretation, the agency determined that documentary proof of citizenship was not "necessary," and thus could not be required of applicants. This interpretation is eminently reasonable. Congress deliberately refused to allow states to condition their acceptance of the Federal Form on proof of citizenship. *See* H.R. Rep. No. 103-66, at 23-24. Furthermore, through rulemaking, the EAC had the opportunity to gather information, balance the risks of voter fraud, and ultimately make an educated decision regarding what information was "necessary" for the Federal Form. 59 Fed. Reg. 32,311.

Petitioner implies that it is better suited to determine what information is "necessary" under the NVRA. Pet'r's Br. at 35-37. But for better or worse, Congress delegated authority to the EAC to determine what information is "necessary" for state officials to determine eligibility — not to state

officials.[7] Under these circumstances, the agency's view must prevail over Petitioner's, even if this Court finds the statutory language to be ambiguous. *United States v. Eurodif S.A.*, 555 U.S. 305, 316, (2009) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (quotation marks omitted; brackets in original)); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.").

The EAC's determination that the NVRA specifically preempts Proposition 200's proof-of-citizenship requirement is likewise entitled to deference under *Chevron*. In the agency's March 2006 letter, the agency determined that "Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law." March 6, 2006 Letter from Thomas Wilkey to Jan Brewer at 3. Petitioner argues that EAC Executive Director Wilkey's letter does not reflect the agency's position. Pet'r's Br. at 18-19, 46. This is simply not true; the letter speaks

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[7] As part of the regulatory process, the EAC was directed to "consult" with state election officials in developing the Federal Form. 42 U.S.C. § 1973gg-7(a)(1), (2). This further clarifies that the role of the states is a consultative one, not a prescriptive one; the authority to craft the Federal Form rests with the EAC.

with the authority of the EAC — not any of its individual members — and is consistent with the agency's policies. Moreover, regardless of whether the letter carries the force of law, the EAC's determination "certainly may influence courts facing questions the agencies have already answered." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

Two votes by the Commission on Arizona's Proposition 200 subsequently confirmed that the agency would not deviate from its precedent of reading the NVRA to require that states accept the Federal Form "without supplementation." Ray Martinez III Position Statement (July 10, 2006) (quoting July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 6a); *see also* EAC Tally Vote (July 31, 2006); EAC Public Meeting (Mar. 20, 2008). While several of Petitioner's amici focus on the fact that a majority of EAC commissioners were unable to agree on an official position concerning Proposition 200 and deadlocked in their tally votes to amend the Federal Form, these arguments overlook the agency precedent on preemption. In 2005, the EAC's General Counsel, with the unanimous consent of the commissioners, advised Florida that it could not require applicants to answer additional questions about mental capacity and felony status on the Federal Form. July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 2a. The advisory went on to clarify the agency's position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.* at 7a. Thus, regardless of any failed tally votes

as to Arizona's Proposition 200, the last time a majority of commissioners spoke on the issue of preemption, they took the position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.*; *see also* 42 U.S.C. § 15328 (requiring that any official action by the EAC must be approved by a majority of commissioners). This official position requires deference. Arizona may not now attempt an end-run around the EAC by indirectly challenging the agency's refusal to accommodate Arizona's Proposition 200 when Arizona never instituted any such challenge directly as required under the Administrative Procedure Act.

In any event, the EAC has long regulated with the assumption that the Federal Form's requirements preempt state law. In establishing the content of the Federal Form, for example, the agency labored to prevent applicants from having to provide unnecessary information. *See* 59 Fed. Reg. 32,311. The fact that the agency expended such effort is evidence of its belief that states could not unilaterally require additional information from applicants, and demonstrates that the EAC has a "thorough understanding of its own regulations and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)); *see also New York v. FCC*, 486 U.S. at 64. In light of this expertise, coupled with the broad delegation of authority to EAC in the text of the NVRA, 42 U.S.C. § 1973gg-7(a)(1), (2), the agency's

stance regarding the preemptive power of its own regulations must be given deference.

Indeed, the EAC's conclusions are entitled to further deference because they carry the force of law. Following the official rulemaking proceedings, the EAC codified the content of the Federal Form in the Code of Federal Regulations. 11 C.F.R. § 9428.4. In so doing, the agency formalized its conclusions that an attestation of citizenship under penalty of perjury was sufficient and that requiring further documentation was not appropriate under the NVRA. *Id.* § 9428.4(b)(2), (3); 59 Fed. Reg. at 32,316 ("The issue of U.S. Citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury."). Even absent *Chevron* deference, such codified requirements are controlling. As this Court has recognized, "an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). This is especially true where, as here, the agency's regulations are clear manifestations of Congress's objectives and directly conflict with state law. *Id.* at 565, 576-77; *Geier*, 529 U.S. at 884.

Amicus does not contest that additional, documentary proof of citizenship might, under some circumstances, be helpful to state officials in assessing some applicants' eligibility to vote. But Congress's clear mandate is that the Federal Form require "*only* such . . . information . . . as is *necessary*," not "all" or "any" such information as "might be helpful" to state election officials. 42

U.S.C. § 1973gg-7(b)(1) (emphasis added). In its capacity as the sole agency charged with designing the Federal Form, the EAC interpreted this mandate, and its reasonable conclusion that an attestation under penalty of perjury is sufficient to verify citizenship is entitled to deference. As the Ninth Circuit opined, even though the petitioner "has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context." *Gonzalez*, 677 F.3d at 403.

III. The NVRA Preempts Proposition 200's Documentary Proof-of-Citizenship Requirement Regardless of Whether the Court Applies a Preemption Analysis Under the Elections Clause or the Supremacy Clause.

No matter what conclusions this Court reaches regarding the proper preemption analysis under the Elections Clause or the Supremacy Clause, the EAC's interpretation of the NVRA dictates the outcome of this case. The NVRA was passed to override burdensome state voter registration laws and streamline the registration process. In order to effectuate these goals, Congress intended the statute to have preemptive effect and for the Federal Form's registration requirements to exist independent of state law. Under either the Elections Clause or the Supremacy Clause, such clear congressional intent is sufficient to empower the EAC to preempt Proposition 200's documentary proof-of-citizenship requirement.

1. The Elections Clause grants Congress "a general supervisory power over the whole subject" of

federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). Under the Clause, Congress wields broad authority to craft "a complete code for congressional elections," including details regarding "registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Congress has such plenary power because the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citation omitted).

Based on the history of the Elections Clause and this Court's precedent on the matter, the Ninth Circuit correctly concluded that the "Elections Clause operates quite differently from the Supremacy Clause." *Gonzalez*, 677 F.3d at 391. In reaching this conclusion, the court reasoned that the "Elections Clause affects only an area in which the states have no inherent or reserved power," and as such, courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Id.* at 392. The court then proceeded to examine the NVRA and Proposition 200 to determine if there was an actual conflict. On this question, the court had no difficulty holding that the two provisions, "when interpreted naturally, do not operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, . . .

[Proposition 200's] registration provision, when applied to the Federal Form, is preempted by the NVRA." *Id.* at 403.

This Court has never conflated the analysis required under the Elections Clause with that mandated by the Supremacy Clause, and in light of their differing histories and purposes, there is no basis for doing so now. Maintaining federal administrative oversight over elections has long been viewed as vital to the integrity of this nation's government, and to this end, it is imperative that Congress remain empowered to regulate this subject matter as needed. *See* The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Preemption is thus appropriate whenever a federal provision passed under the Elections Clause directly conflicts with a state law, regardless of other factors or concerns. *Gonzalez*, 677 F.3d at 394. Under this standard, Proposition 200's documentary proof-of-citizenship requirement is preempted because it conflicts with both the EAC's determination of what information is "necessary" and the NVRA's command that states "accept and use" the Federal Form. *Id.* at 403.

2. Even if this Court agrees with Petitioner that preemption principles derived from the Supremacy Clause are applicable in the Elections Clause context, it still must find that the NVRA preempts

Proposition 200's documentary proof-of-citizenship requirement. The analysis under the Supremacy Clause is governed by congressional intent, which serves as the "ultimate touchstone in every pre-emption case." *Wyeth*, 555 U.S. at 565 (quotation marks omitted). Consequently, when faced with a possible conflict between state and federal law, courts begin by examining whether Congress intended for federal law to prevail. Congress may express its intent either directly in the statute's language, or implicitly through its structure and purpose. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Here, Congress expressly delegated authority to the EAC in the NVRA to determine what information was "necessary" for the Federal Form. The EAC acted pursuant to that delegation, and in doing so, preempted state law to the contrary. It is well-established that even under Supremacy Clause preemption principles, a "formal agency statement of pre-emptive intent" is not necessary. *Geier*, 529 U.S. at 884. "To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Id.* at 885. Moreover, if the conflict between state and federal law is clear and insurmountable, preemption must follow. *Id.*

There are undeniable conflicts between Proposition 200's documentary proof-of-citizenship requirement and the Federal Form. Arizona

dictating the content of the Federal Form directly contradicts Congress's exclusive delegation of authority to the EAC to develop the form and determine what identifying information is "necessary." 42 U.S.C. § 1973gg-7(b). And as the Ninth Circuit explained, "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form."[8] *Gonzalez*, 677 F.3d at 398. Such direct conflicts, coupled with a clear Congressional desire to supplant state law, are sufficient to overcome even the strongest interpretation of the presumption against preemption.

Petitioner's claim that Congress expressly denied the EAC preemptive authority in the NVRA is wrong and plainly misreads the statute. Pet'r's Br. at 44-45. Though Congress prohibited the EAC from imposing some requirements on states, Congress expressly carved out the EAC's authority to impose requirements on states "*to the extent permitted under section 1973gg-7(a).*" 42 U.S.C. § 15329 (emphasis added). Section 1973gg-7(a), in turn, granted the EAC broad power to "prescribe such regulations as are necessary" to "develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(1), (2). Congress

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[8] Indeed it is difficult to imagine formulations more at odds with one another than Arizona's requirement to "reject" and the NVRA's requirement to "accept" the same registration application. *Compare* Ariz. Rev. Stat. § 16-166(F) *with* 42 U.S.C. § 1973gg-4(a)(1).

thus explicitly exempted the EAC's authority to craft and regulate the Federal Form from any limitations otherwise imposed on the agency. If anything, this exemption demonstrates congressional awareness that the Federal Form would necessarily preempt state law.

The EAC's position that a state cannot add a proof-of-citizenship requirement to the Federal Form is thus dispositive regardless of what preemption principles the Court employs. Under either standard, the NVRA carries preemptive force, and because the statute delegates authority to the EAC, the agency is likewise empowered to preempt state law. *See New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A] federal agency may pre-empt state law . . . if it is acting within the scope of its congressionally delegated authority." (quotation marks omitted)). Aware of its preemptive authority, the EAC decided that it could not require documentary proof of citizenship on the Federal Form, and under *Chevron*, Petitioner has no basis for questioning this reasonable decision.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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January 22, 2013

APPENDIX

APPENDIX A

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

RECEIVED
DEPARTMENT OF STATE
05 AUG – 1 AM 11:51
DIVISION OF ELECTIONS
TALLAHASSEE, FLORIDA

July 26, 2005

Ms. Dawn Roberts
Director, Division of Elections
Florida Department of State
500 South Bronough Street
Tallahassee, Florida 32399

Dear Ms. Roberts,

This letter responds to your June 1, 2005 request for guidance from the U.S. Election Assistance Commission (EAC) regarding Florida's proposed policies governing the acceptance of the Federal Mail Voter Registration Form.[1] As you know, use and

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[1] You have also requested guidance from EAC regarding Florida's policies as they relate to the Federal Postcard Application. The EAC is not the appropriate agency to provide guidance on the use and acceptance of that form, rather, the

acceptance of this Federal form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.*, (NVRA). After review of your letter and its attachments, the EAC concludes that the policies you propose effectively result in a refusal to accept and use the Federal Voter Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4(a)).

Proposed Policy. In your letter, you conclude that Florida law requires all registration applications to contain three boxes that must be checked in order to affirmatively respond to voter qualification questions regarding felony status, mental incapacity and citizenship. This mandate has been deemed to apply to the Federal Mail Voter Registration Form. As two of the Florida required "checkboxes" are not present on the Federal Registration Form,[2] the State intends to treat all Federal forms received as incomplete. Under Florida's proposed policy, applicants using the Federal form will be notified that their submission was incomplete and will be required to submit supplemental information prior to "book closing." Failure of applicants to take such action will result in an invalid registration and the loss of voting rights.

Department of Defense's Federal Voting Assistance Program is the cognizant authority. 42 USCS § 1973 ff *et seq.*

[2] The Federal Mail Registration Form does not have check boxes to affirm mental capacity and felony status. However, the Help America Vote Act of 2002 required the addition of a check box to affirm citizenship status. 42 U.S.C. §15483(b)(4).

The State's position on this matter is based upon Florida Statutes and changes thereto contained in a newly passed bill (HB 1567). This bill was recently signed into law by Florida's Governor. The changes to the Florida Statutes noted in your letter include an amendment to section 97.052. This change adds the aforementioned "checkboxes" to the "uniform statewide voter registration application." Also included in the changes, is an amendment to section 97.012, stating that a voter registration is complete only if there is a mark in each if [sic] these "checkboxes." The letter also cites section 97.-052(5), noting that the voter registration application prescribed by the Election Assistance Commission will be accepted only if it contains information required by State law. Based upon the information we have received, the Florida Legislature has not changed its voting qualifications found in Section 97.041 of the Florida Statues.

Federal Authority. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th

Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp 330, 351 – 355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections... or to 'alter' the laws initially promulgated by the states. Thus... article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller*, 129 F.3d at 836.

In this way, while it is clear that Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NRVA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use*

the mail voter registration applicant proscribed by the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Florida has sole authority to determine voter qualifications, the manner in which it registers voters is subject to Federal regulation. Florida's voting qualifications remain unchanged and are contained in Section 97.041 of the Florida Statutes. The Federal Mail Registration Form, per its State instructions section, accurately reflects these qualifications. The statutory changes Florida has initiated, requiring the use of a "checkbox" in its registration forms, do not alter its voter qualifications. Rather, the "checkbox" scheme is merely a means to determine, document and communicate existing voter eligibility requirements.

As such, Florida's statutory changes deal with the manner in which registration is conducted and are,

therefore, subject to Federal law. Congress has clearly regulated in this area by prescribing the Federal Mail Registration form. The NVRA and HAVA have determined the manner in which voter eligibility shall be documented and communicated on this Federal form. State voter requirements are documented by the applicant via a signed attestation.[3] 42 U.S.C. §1973gg-7(b)(2).

In this way, Florida's proposed policy, to treat all Federal Mail Registration Forms received as incomplete, violates the provisions of the NVRA. The NVRA requires States to both "accept" and "use" the Federal Form. Under Florida's policy, State officials would take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their Federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither "accepted" nor "used" by the State. The language of the NVRA mandates that the Federal form, without supplementation, be accepted and used by States to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the

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[3] As previously noted, HAVA requires the Federal form to document citizenship and age requirements (common to all States) through the use of two "checkboxes." 42 U.S.C. §15483(b)(4).

Federal form is subject only to HAVA's verification mandate. 42 U.S.C. §15483.

Given that Florida's proposed policy conflicts with the NVRA, these policies are untenable. Article I, Section 4 and Article II, Section 1 of the U.S. Constitution grant the Congress the authority to regulate the manner in which States conduct voter registration in Federal elections. Congress has chosen to regulate voter registration through HAVA and the NVRA; this regulation, therefore, supersedes State law. Thus, states may not create policies or pass laws which conflict with these authorities.[4]

Conclusion. Florida's proposed policy violates NVRA requirements. The State may not refuse to accept and use the Federal form. If you have any questions regarding this letter or wish to discuss

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[4] While the EAC does not make a practice of interpreting State law, it is important to note that the statutory changes identified in the June 1st letter do not necessarily prohibit acceptance of the Federal form. The changes to section 97.052 clearly alter the State form, not the Federal form. The changes to section 97.012, requiring boxes to be checked before a form is complete, may also be reasonably interpreted to apply only to the State registration form. Similarly, Section 97.052(5), requiring the Federal form to be accepted only if it complies with State requirements, must be interpreted to reject the form only when it fails to reflect State voter eligibility requirements. Otherwise, the section would contradict Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, which grants Congress authority to regulate the manner in which Federal elections are held.

alternative policies, please contact the undersigned at (202) 566-3100.

/Gavin S. Gilmour/

Gavin S. Gilmour
Associate General Counsel

AMICUS CURIAE BRIEF

No. 12-71

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA, *ET AL.*,

Petitioner,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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December 14, 2012

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INTERESTS OF *AMICI CURIAE*

Amici are certain Members of Congress whose names are listed in Appendix A. Members of Congress have a particular interest in the interpretation of federal statutes and their preemptive effect on state laws.[1] Because this case involves the extent to which the National Voter Registration Act limits the ability of states to determine the times, places, and manner of holding elections, the views of *amici* are particularly relevant. *Amici* include the Chairman of the Committee on House Administration, which has jurisdiction over federal elections, and the Chairman of its Subcommittee on Elections.

SUMMARY OF ARGUMENT

The Ninth Circuit created a new and ill-conceived test to determine whether an enactment of Congress under its U.S. Const. art. 1, § 4, cl. 1 (hereinafter "Elections Clause") power to alter state regulations concerning the times, places, and

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, who are Members of Congress, their counsel, Lungren for Congress, or Gregg Harper for Congress made a monetary contribution to its preparation or submission.

manner of holding elections preempts state laws on similar subject matter. The Court's previous decisions make clear that the proper inquiry is whether the federal and state statutes conflict, not whether they "operate harmoniously." If the Ninth Circuit's test were adopted, it would impair the ability of Congress to legislate in the area of elections with confidence of the preemptive effect federal statutes would exert.

Using the correct test, the National Voter Registration Act does not preempt ARIZ. REV. STAT. § 16-166(F.), Arizona's law requiring that voter registration applicants provide proof of citizenship with their applications. The federal voter registration form contemplates additional information being required in the same manner that Arizona requires additional information to verify citizenship, and there is no conflict between requiring a state to "accept and use" the federal form and allowing the state to require additional verification of information on the form. Further, in reaching its decision the Ninth Circuit considered actions of the federal Election Assistance Commission that do not point to a clear result. Those actions should be given no weight by this Court.

ARGUMENT

I. *Siebold* and *Foster* Establish That the Proper Test is Whether Statutes Conflict, Not Whether They Operate Harmoniously

To reach its decision, the Ninth Circuit used a newly-created test of when a federal statute under the Elections Clause preempts a state statute. This new test alters the analysis and leads to an incorrect result. Had the Court of Appeals correctly analyzed the federal and state statutes to determine whether they conflict, it would have found there is no preemption by the National Voter Registration Act ("NVRA") in this case, even in the absence of a presumption against it.

The core of the preemption test announced by the Court of Appeals is whether the federal and state statutes "operate harmoniously." *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012). If they do not, then the *Gonzalez* majority would find that "Congress has exercised its power to 'alter' the state's regulation, and that regulation is superseded." *Gonzalez*, 677 F.3d at 394.

The "operate harmoniously" test departs from previous decisions of the Court analyzing preemption under the Elections Clause based on the existence of a conflict between the federal and state statutes (see, e.g., *Siebold*, 100 U.S. 371 (1879), and *Foster* 522

U.S. 67 (1997)). In the case of the "operate harmoniously" test, novelty is not a virtue. The test is an invitation to litigation and an impediment to effective lawmaking.

In *Ex parte Siebold*, 100 U.S. 371 (1879), the petitioners sought a writ of habeas corpus to escape imprisonment for violating federal statutes enacted to punish election fraud. The petitioners argued that the Elections Clause gave Congress the power to fully regulate elections or to not regulate them, but not to partially regulate them as was done by the statute under which the petitioners were convicted.

This Court rejected the claim that the Elections Clause provided an all-or-nothing grant of authority. Having concluded that the Constitution permitted Congress to partially preempt state laws governing elections, the Court in *Siebold* then made absolutely clear that the test for whether Congress had done so was the existence of a conflict between the federal and state enactments.

The Court unambiguously stated this test four times:

1. "When exercised, the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them." *Siebold*, 100 U.S. at 384 (emphasis added).

2. "[T]he regulations made by Congress are paramount to those made by the State legislature and, *if they conflict therewith*, the latter, so far as the conflict extends, ceases to be operative." *Siebold*, 100 U.S. at 384 (emphasis added).

3. "We have shown, as we think, that, *where the regulations of Congress conflict with those of the State*, it is the latter which are void, and not the regulations of Congress, and that the laws of the State, insofar as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." *Siebold*, 100 U.S. at 397 (emphasis added).

4. "[T]he Constitution and constitutional laws of the [United States] are, as we have already said, the supreme law of the land, and, *when they conflict with the laws of the States*, they are of paramount authority and obligation." *Siebold*, 100 U.S. at 399 (emphasis added).

In contrast to *Siebold*'s clearly held rule that preemption occurs in the case of a conflict between federal and state laws, the Ninth Circuit casts aside the use of conflict as a test and instead looks to

whether the statutes "operate harmoniously." Though the circuit court cites no case when declaring that test, it appears to have drawn the words from *Siebold*. However, its use of them is unsupported by the Court's language in *Siebold*. While the Court declares the existence of conflict as the clear test for preemption, it mentioned the concept of harmonized state and federal statutes only in passing: "not the slightest difficulty in a harmonious combination," *Siebold*, 100 U.S. at 384; "no such conflict between them as to prevent their forming a harmonious system," *Siebold*, 100 U.S. at 386; "[w]here there is a disposition to act harmoniously there is no danger of disturbance," *Siebold*, 100 U.S. at 386; and "we shall hear no more about the impossibility of harmonious action," *Siebold*, 100 U.S. at 387. Nowhere in *Siebold* does the Court say that the existence of harmonious combinations, systems, or actions are to be used in determining whether the federal enactment preempts the state's. The Court instead makes clear that the presence of conflict decides that question.

If the Ninth Circuit's reliance on *Siebold* for its "operate harmoniously" test is unavailing, its reliance on *Foster* is mystifying. In *Foster v. Love*, 522 U.S. 67 (1997), the challenged statute was a Louisiana law providing for an election in October in which any candidate receiving more than fifty percent of the vote would be declared elected, with a subsequent election on the November date fixed in federal statute occurring only if no candidate achieved that threshold. The issue before the Court was whether the federal statute fixing the date for

federal elections in November preempted Louisiana's statute allowing a candidate to be elected in October.

While concluding that it did, the Court used no variation of the word "harmony" at any place in its opinion. The only test referred to by the Court was whether there was a conflict between the state and federal laws. In concluding its opinion, the Court said the Louisiana statute "conflicts with federal law and to that extent is void." *Foster*, 522 U.S. at 74.

The "operate harmoniously" test announced by the Ninth Circuit is a creature of its own making, one that did not exist previously and that conflicts with the proper test set forth by the Court beginning more than a century ago. Moreover, viewed by a legislator, the "operate harmoniously" test is a creature with fangs.

II. The Operate Harmoniously Test Impairs Congress' Ability To Legislate Effectively

When drafting legislation under the Elections Clause, Congress may intend to preempt known state laws or it may desire to set a rule that will supersede state laws that may be unknown and inconsistent with it. At the same time, Congress may wish to leave intact state laws that are different than but not inconsistent with the federal statute. When the test of preemption is a conflict between federal and state laws, Congress may calibrate its language

to ensure that it controls so much of the subject as it wishes but not more nor less. Congress may set out the rule it wishes to establish, and know how state statutes will be judged against that rule.

If, however, state statutes will be judged by whether they "operate harmoniously" with a federal statute, Congress is left to speculate as to what conclusions courts might reach. "Harmony" is a highly subjective term and how a pair of statutes will "operate" in connection with one another is susceptible to a wide range of factual speculations and interpretations. The result is that Congress cannot know with any reasonable measure of certainty how its enactments will affect state statutes under an "operate harmoniously" test.

III. Arizona's Law Does Not Conflict With The National Voter Registration Act

When a "clear conflict" analysis is used, the requirements of ARIZ. REV. STAT. § 16-166(F.) do not create a clear conflict with the National Mail Voter Registration Form ("Federal Form"). Regulations made by Congress under the Elections Clause are paramount to those made by State legislatures, but only "so far as [the conflict] extends and conflicts with the regulations of the State . . . ." *Siebold*, 100 U.S. at 384. The statute's requirement for documentary proof of citizenship accompanying the Federal Form does not conflict with the requirement

under NVRA that States "accept and use" the Federal Form. The statute is not in clear conflict with the NVRA under the requirement to "accept and use" the Federal Form developed pursuant to 42 U.S.C. § 1973gg-4(a)(1).

The Ninth Circuit admits that "[i]f a state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme." Subsequently, when applying this test, the Ninth Circuit erred. Arizona's enactment of ARIZ. REV. STAT. § 16-166(F.) complements the NVRA by requiring proof of citizenship in conjunction with the Federal Form. The NVRA included the stated purpose "to protect the integrity of the electoral process." 42 U.S.C. § 1973gg(b)(3). Requiring proof of citizenship is a recognized method of ensuring the integrity of voter registration and the electoral process generally. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (discussing how dilution of votes debates or dilutes the weight of a "citizen's vote"). Requiring documentary proof of citizenship both fits within the scheme of accepting and using the Federal Form and the NVRA process of having a state develop its own form.

The NVRA's provisions requiring a state accept and use the Federal Form supplement, not supplant, the state registration system and the statute's requirements. This Court has commanded lower courts to avoid construing statutes to create conflicts with statutes. *See, e.g., La. Pub. Serv.*

Comm'n v. F.C.C., 476 U.S. 355, 370 (1986) ("[W]here possible, provisions of a statute should be read so as not to create a conflict. . . ."). This Court has noted that "Congress may indicate pre-emptive intent . . . through a statute's express language or through its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The NVRA specifically does not indicate intent to preempt the totality of a state system of registration. The NVRA indicated an intent to supplement the state system of registration by specifically allowing states to develop their own forms and permitting the Federal Form to require "identifying . . . and other information . . . as is necessary to enable the appropriate State Election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). Both the text and the structure of NVRA indicate that Congress wished to supplement, not supplant, existing state voter registration methods.

NVRA specifically recognizes citizenship as an eligibility requirement. NVRA requires the contents of the mail voter registration form contain a statement that "specifies each eligibility requirement (including *citizenship*)." 42 U.S.C. § 1973gg-7(b)(2)(A) (emphasis added). NVRA's congressional findings specifically state that "the right of *citizens* of the United States to vote is a fundamental right." 42 U.S.C. § 1973gg(a)(1) (emphasis added). Even within the statute, NVRA recognizes that citizenship verification is an important aspect. The statute's recognition of citizenship as an essential prerequisite

to voting dovetails with Arizona's requirement for documentary proof of citizenship.

Each Federal Form is required to include a statement specifying the eligibility requirement including citizenship. 42 U.S.C. § 1973gg-7(b)(2)(A). While the Federal Form specifically requires certain statements, the Federal Form specifically prohibits notarization or other formal authentication. 42 U.S.C. § 1973gg-7(b)(4). Thus, Congress has spelled out specific prohibitions for items that cannot be included in the Federal Form. Congress has not, however, prohibited requesting documentary proof of citizenship. When Congress includes language in one section of a statute but omits it in another section of the same Act, Congress is generally presumed to have done so intentionally. *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010). Congress's exclusion of proof of citizenship on the contents of the Federal Form indicates that Congress permitted the use of proof of citizenship on the Federal Form so long as the proof of citizenship "is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

The Federal Form's inclusion of state specific instructions contemplates that States will request supplementary information. For example, the States of Alabama and Florida specifically request the execution of an oath in conjunction with the submission of their Federal Form. Election Assistance Comm'n, National Mail Voter

Registration Form (March 3, 2006), 3, 6, *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (hereinafter "Federal Form") (Pet. App. 67c, 70c). Therefore, the Federal Form under the current NVRA scheme already requires that States not treat the Federal Form as a complete application. Instead, the current instructions for the Federal Form contemplate that the Federal Form requires certain outside pieces of information to complete the registration process. The requirement to "accept and use" the Federal Form in 42 U.S.C. § 1973gg-4(a)(1) requires that States only accept the Federal Form and use it as part of the process to assess the eligibility of the applicant. The State can still require that additional information be furnished in conjunction with the Federal Form. Denying a state the ability to require additional information when using the federal form could place the NVRA in conflict with the authority granted to states by U.S. Const. art. I, § 2, cl. 2 and U.S. Const. amend. XVII to determine the qualifications of electors.

IV. The Actions of the Election Assistance Commission Should Have No Weight in Deciding This Case

The Ninth Circuit cited the refusal by the Election Assistance Commission (EAC) to modify the Federal Form as evidence of a federal law in conflict with the Arizona requirement. *Gonzalez*, 677 F.3d at 400. Assigning any weight to the EAC's actions or

inactions is an error that this Court should not repeat.

The Help America Vote Act ("HAVA") includes the specific requirement that, "Any action which the Commission is authorized to carry out under this Act may be carried out only with the approval of at least three of its members." 42 U.S.C. § 15328. The letter from the EAC's then-Executive Director to Arizona stating the EAC's refusal to modify the Federal Form was not based on a vote of the commissioners. If the EAC's refusal to modify the Federal Form was a discretionary act of policy, then the decision should have been made by a majority of the commissioners and should be disregarded by the Court. If, on the other hand, the decision whether or not to modify the form did not involve the exercise of discretion but was instead directed by the NVRA and state law, then the action by EAC staff was administrative in nature and should not influence the Court.

Following the refusal letter of March 6, 2006, the EAC failed on five occasions to decide how it would act on requests to revise state-specific instructions in the Federal Form. By a vote dated July 31, 2006, taken on written ballots outside a public meeting, the commissioners considered a proposal to grant Arizona's request and revise the Federal Form's instructions. App. B (EAC Tally Vote). Two commissioners voted in favor and two against, so the motion failed. *Id.*

On October 4, 2007, the EAC voted on a proposal stating that EAC staff could revise the Federal Form instructions to reflect changes in mailing addresses but all other changes would require approval of the commissioners. Two commissioners voted in favor of that proposal and two against. App. C (EAC Meeting Oct. 4, 2007).

At a public meeting on January 17, 2008, the EAC commissioners considered another proposed policy on changes to the Federal Form's instructions. On this vote again, two commissioners voted in favor and two against. App. D (EAC Meeting Jan, 17, 2008). Yet another policy was considered at the EAC's public meeting on February 7, 2008, and again the vote was two in favor and two against. App. E (EAC Meeting Feb. 7, 2008). On March 20, 2008, the EAC at a public meeting again considered the Arizona request and the vote was two in favor and two against (at the same meeting the EAC approved seven other requests from states for changes to their instructions in the Federal Form). App. F (EAC Meeting Mar. 20, 2008).

While the EAC repeatedly refused to amend the Federal Form's state instructions to reflect Arizona's requirement for proof of citizenship, the Federal Form includes other statements regarding state requirements surpassing those in federal law. The HAVA imposed a requirement that those submitting their registration application by mail must either appear in person and show identification

the first time they vote, or include identifying information on their application. 42 U.S.C. § 15483(b). Forms of satisfactory identifying information include "at least the last four digits of the individual's social security number" along with the individual's date of birth. 42 U.S.C. § 15483(b)(3)(B). Notwithstanding that the federal statute requires only the last four digits of the social security number, the state instructions in the Federal Form describe requirements to include the full social security number for six states: Hawaii, Federal Form at 7 (Pet. App. 71c), Kentucky, Federal Form at 9 (Pet. App. 73c), New Mexico, Federal Form at 14 (Pet. App. 78c), South Carolina Federal Form at 16 (Pet. App. 80c), Tennessee, Federal Form at 17 (Pet. App. 81c), and Virginia, Federal Form at 18 (Pet. App. 82c).

In sum, the EAC has granted some requests to change the Federal Form's state instructions while refusing Arizona's. It denied Arizona's request through a staff decision, but the commissioners voted on other requests (and took later votes on the Arizona request). Moreover, it denied Arizona's request to modify its state instructions to note a requirement beyond those in the NVRA notwithstanding that six other states' instructions note requirements of verification information beyond those in the HAVA. This case does not challenge the EAC's actions as arbitrary and capricious, but they are sufficiently incoherent that we urge the Court to accord them no weight in its decision.

CONCLUSION

Determining whether two statutes "operate harmoniously" is an inherently subjective and uncertain exercise. In establishing this test, the Ninth Circuit introduced novelty to an area of the law that does not require it. This Court and others consistently have used conflict between federal and state statutes as the test of whether the former preempts the latter. Altering that test would introduce a new measure of uncertainty into the legislative process. The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

LIST OF AMICI CURIAE

Congressman Daniel E. Lungren (Ca.)
Chair, Committee on House Administration

Congressman Gregg Harper (Ms.)
Chair, Subcommittee on Elections

APPENDIX B

BEFORE THE ELECTION ASSISTANCE COMMISSION

In the Matter of
Arizona Request for Accommodation

CERTIFICATION

I, Paul S. DeGregorio, Chairman of the U.S. Election Assistance Commission, do hereby certify that on July 11, 2006, the Commissioners voted on the above referenced matter. This matter proposed that the Commission accommodate Arizona's proof of citizenship procedure by amending the state specific portion of the Federal Voter Registration Form. The matter also proposed a letter to communicate this decision to the state. All ballots were timely submitted.

After review of the ballots, I certify that the measure fails, having not achieved the requisite 3 votes required by law. Commissioners Davidson and DeGregorio voted affirmatively, and Commissioners Martinez and Hillman objected.

Attest:
July 31, 2006
Date
/s/
Paul S. DeGregorio
Chairman

APPENDIX C

[1] U.S. ELECTION ASSISTANCE COMMISSION PUBLIC MEETING

1225 New York Avenue, N.W.Washington, D.C.

Taken on the date of: Thursday, October 4, 2007

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[150]

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MR. GILMOUR: The Chair has not stated the question or stated the motion.

CHAIR DAVIDSON: She made the motion. I have not reread it. The question before we do the vote. We were at that discussion point. [151]

I will read the question. The Elections [sic] Assistance Commission, the EAC, hereby authorizes the director of the Election Administration to amend the state instruction portion of the federal mail voter registration application form when a state government official notifies the EAC of a change in the state mailing address.

For all other requests submitted by the state government official to amend the state instructions portion of the federal mail voter registration application form the director of Election Administration shall immediately notify the executive director who shall amend the state's

instruction portion of the federal mail voter registration form.

Provided, one, the request properly [152] reflects the state law and, two, the request does not require the EAC to alter the voter registration application.

The Commission shall vote on all appeals brought by a state government official of the executive director's decision. [153]

MR. GILMOUR: My apologies, but to make sure we have a clear record before debate began so we all know what we are voting on. I think we should make clear what action we are taking oon [sic] the statement.

CHAIR DAVIDSON: A motion and a second. And I just read the question.

MR. GILMOUR: The action would be to approve this as the EAC policy.

THE COURT: [sic] That's correct.

MR. GILMOUR: I just wanted to make that clear.

CHAIR DAVIDSON: Thank you. And a roll call vote has been requested. So, if you would do the roll call vote, please.

MR. GILMOUR: Again, I'm going by the [154] rules. Do you want to have a debate on issue?

CHAIR DAVIDSON: I thought we had the discussion prior to my reading it. I thought that was the final. I read it the final time. Everybody is prepared to vote.

MR. GILMOUR: All right. Chair Davidson? [155]

CHAIR DAVIDSON: Yes.

MR. GILMOUR: Vice Chair Rodriguez?

COMMISSIONER RODRIGUEZ: No.
MR. GILMOUR: Commissioner Hillman?
COMMISSIONER HILLMAN: No.
MR. GILMOUR: Commission Hunter?
COMMISSIONER HUNTER: Yes.
CHAIR DAVIDSON: The motion fails. It's a tie vote.
****

APPENDIX D

[1] Minutes of the Public Meeting
United States Election Assistance Commission
1225 New York Avenue, NW Suite 150
Washington, DC 20005

Held on Tuesday, January 17, 2008

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[45]

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CHAIRWOMAN RODRIGUEZ: Thank you Vice-Chair Hunter. Is there any further discussion? We have a motion on the table. Are we ready to vote? And

just to restate the motion it is to adopt the Federal Election Commission policy for amending state instructions to state law. [46]

I suppose we should do a roll call, Madam General Counsel.

COUNSEL HODGKINS: Commissioners the question is whether or not to adopt the proposal that was made by Commissioner Hunter, which is essentially the exact same policy that was in place at the FEC. A vote of yea would vote to adopt that policy. A vote of nay would vote not to adopt that policy. So please respond by saying yea or nay when I call your name.

Rosemary Rodriguez, Chair?

CHAIRWOMAN RODRIGUEZ: No.
COUNSEL HODGKINS: Caroline Hunter?
VICE-CHAIR HUNTER: Yes.
COUNSEL HODGKINS: Donetta Davidson?
COMMISSIONER DAVIDSON: Yes.
COUNSEL HODGKINS: Gracia Hillman?
COMMISSIONER HILLMAN: No.
COUNSEL HODGKINS: Madam Chair, the vote is two to two. The motion does not pass.
****

APPENDIX E

[1] Minutes of the Public Meeting

United States Election Assistance Commission
Hyatt Regency on Capitol Hill
Yorktown Room
400 New Jersey Avenue, NW Washington, DC 20001
Held on Thursday, February 7, 2008
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[72]
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COMMISSIONER HILLMAN: I would call the question, Madam Chair.
CHAIR RODRIGUEZ: Thank you. All those in favor of adopting the "Proposed Interim Procedure for Updating the Federal Mail Voter Registration Form" indicate by saying aye.
COMMISSIONER HILLMAN: Aye.
CHAIR RODRIGUEZ: Aye. Those opposed?
VICE-CHAIR HUNTER: Nay.
COMMISSIONER DAVIDSON: Nay.
CHAIR RODRIGUEZ: Any abstentions? Okay, the motion fails for lack of a majority.
[The motion failed for lack of a majority.]
****

APPENDIX F

[1] Minutes of the Public Meeting

United States Election Assistance Commission

Hyatt Regency Denver at Colorado Convention Center

Mineral Hall

650 15th Street

Denver, CO 80202

Held on Thursday, March 20, 2008

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[123]

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CHAIR RODRIGUEZ: It's been moved and seconded to adopt a change submitted by the State of Colorado correcting its mailing address. Apparently they've moved. Is there any discussion on this motion?

COMMISSIONER DAVIDSON: Call for the question.

CHAIR RODRIGUEZ: As Chair, I didn't get to say what I was going to say. I, too, lament – I believe we unanimously lament the lack of an over-arching policy by which we can make changes to the state instructions on the form. This change, because it's a

change to existing information, simply an update of existing information on the form, even in the absence of a policy, I will support.

Okay, all those in favor of making the requested change by the State of Colorado indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: We are unanimous in making the Colorado change.

Commissioner Hillman?

COMMISSIONER HILLMAN: I will continue but, I will say to my colleagues if anyone of them wants to jump in and read any one of these, please feel free.

Number two is New Jersey. New Jersey has submitted a change to its voter registration procedures, moving the voter [124] registration deadline from 29 days before an election to 21 days before an election. So I move that EAC approve the request from New Jersey to update the state-specific instructions reflecting that the "Registration Deadline is 21 days before the election."

COMMISSIONER DAVIDSON: I'll second it.

CHAIR RODRIGUEZ: It's been moved and seconded to adopt a change submitted by the State of New Jersey. Is there discussion on the motion?

I'll just invoke my previous statement, I won't repeat it. Any further discussion? All those in favor of making the New Jersey submitted change indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: Okay, New Jersey is done. Rhode Island?

COMMISSIONER HILLMAN: Rhode Island's request is for the state instructions to be updated concerning voter eligibility requirements listed under item number nine, and the change would read as follows and it is my motion to – for EAC to approve the request to update Rhode Island's state-specific instruction nine – number nine which is under "Signature." And it would read, "To register in Rhode Island you must: be a citizen of the United States, be a resident of Rhode Island for 30 days preceding the next election, be 18 years old by election day, not be currently incarcerated in a correctional facility due to a felony conviction, not have been lawfully judged to be mentally incompetent."

[125] COMMISSIONER DAVIDSON: I'll second it.

COMMISSIONER HILLMAN: I didn't explain what the change was. Prior to that you were not eligible if you were on probation or parole.

CHAIR RODRIGUEZ: Okay, it's been moved and seconded to adopt the change submitted by the State of Rhode Island to the state-specific instructions on the form. Is there any discussion? I'll reference my earlier statement. Are we ready to vote? All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: Also Commissioner Hillman referenced a letter from Secretary of State Brewer that we'll include in the record of this meeting. I have copies.

Commissioner Hillman?

COMMISSIONER HILLMAN: Delaware. Delaware has submitted a request concerning its voter registration deadline. I move approval of the request to upgrade Delaware's state-specific instructions concerning registration deadline. The registration deadline is now "The 4th Saturday before a primary or general election, and 10 days before a special election."

COMMISSIONER DAVIDSON: Second.

CHAIR RODRIGUEZ: [126] It's been moved and seconded to adopt this change submitted by the State of Delaware to the state-specific instructions. Is there any discussion on the motion? I reference my earlier statement. All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

COMMISSIONER HILLMAN: Iowa. Request from Iowa to update the state-specific instructions concerning registration deadline. I move that EAC approve an update to Iowa's state-specific instructions to reflect its new "Registration Deadline" which is "must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election...

CHAIR RODRIGUEZ: That should be -- that's a typo.

COMMISSIONER HILLMAN: State primary or general election? I would just ask Edgardo Cortes, because I wasn't sure if that meant state primary during the general election. Is that "of" or "or"?

MR CORTES: It's "or."

COMMISSIONER HILLMAN: "Or"? Okay. All right, I will just read that again. "Registration Deadline - must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others. Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline." And there's a footnote as a part of the instructions. "If you fail to meet the voter registration deadlines above you can [127] register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website," and then it quotes the website address.

CHAIR RODRIGUEZ: Are we sure that is correct, Mr. Cortes?

MR. CORTES: It is.

CHAIR RODRIGUEZ: That website. I just want to make sure there's no typos in that.

MR. CORTES: Well, I copied it straight from the information that they provided.

We can -- I can contact Iowa to...

CHAIR RODRIGUEZ: We'll proofread everything.

MR. CORTES: But it's copied directly from the information provided to us.

COMMISSIONER DAVIDSON: I second the motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the change to the state- specific instructions from the State of Iowa. I'll reference my earlier statement. Is there any further discussion? All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: We are unanimous.

COMMISSIONER HILLMAN: [128] Utah. Request from Utah to update its state-specific instructions concerning voter registration deadline. I move that the request be approved and the instructions updated. The "Registration Deadline - 30 days before the election for mail-in applications; 15 days before the election for walk-in registration at the county clerk's office."

COMMISSIONER DAVIDSON: Second the motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the change from the State of Utah to its state-specific instructions. Is there discussion on the motion? I reference my earlier statement. All those in favor of adopting Utah please indicate by saying aye. Any opposed?

[The motion carried unanimously.]

COUNSEL HODGKINS: Madam Chair, if I might, I just wanted to note for the record Mr. Cortes informed me that Utah did make a request to

change their address on the form as well, but the change was to the same address that is already on the form. So there was effectively no change. In other words, they sent in a request to update their address, but it was the same address that was already on the form, so that's why we did not propose that change for your consideration.

COMMISSIONER HILLMAN: There was no change required.

COUNSEL HODGKINS: Right. Thank you for stating that much better than I did.

[129] COMMISSIONER HILLMAN: Okay. Next is Georgia. The request is to update the state-specific instructions regarding item "#6. ID Number." And I move that the request be approved and the information updated as follows: "#6. ID Number. Federal law requires you to provide your full Georgia Drivers License number or Georgia State issued ID number. If you do not have a Georgia Drivers License or Georgia ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a Georgia Drivers License or Social Security number, a unique identifier will be provided for you."

COMMISSIONER DAVIDSON: Second the motion.

COMMISSIONER HILLMAN: And just to clarify, that prior to this updating, Georgia was requesting

the full Social Security number. And this would bring it into compliance with HAVA.

CHAIR RODRIGUEZ: Very good. Okay, it's been moved and seconded to accept the Georgia submitted revision to its state-specific instructions. Is there discussion on the motion? I'll reference my earlier statement. All those in favor of adopting the Georgia change indicate by saying aye. Any opposed?

[The motion carried unanimously.]

[130]COMMISSIONER HILLMAN: Madam Chairman, those are the seven pending requests to update the state-specific instructions that EAC had not previously considered.

CHAIR RODRIGUEZ: Thank you. Commissioner Hunter?

VICE-CHAIR HUNTER: Madam Chair, I'd like to bring up another pending request from the State of Arizona to amend their state instructions to properly reflect their state law. I don't have the full language with me. It's rather lengthy. In any case, but I move to adopt the language as submitted to the EAC by the State of Arizona. Thank you.

COMMISSIONER DAVIDSON: I second that motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the language to Arizona's state-specific instructions as previously...

VICE-CHAIR HUNTER: As submitted.

CHAIR RODRIGUEZ: ..and frequently – as submitted...

COMMISSIONER HILLMAN: Frequently too, yes.

CHAIR RODRIGUEZ: ...as previously submitted by the State of Arizona. Is there discussion on the motion?

COMMISSIONER HILLMAN: [131] Madam Chair, I just want to say that this Commission has considered that request on several occasions and I would just state for the record that my position remains the same. I do not think that EAC ought to take action while the issue is currently being litigated.

COMMISSIONER DAVIDSON: Madam Chair?

CHAIR RODRIGUEZ: Commissioner Davidson?

COMMISSIONER DAVIDSON: My feeling, is once a state has requested change to their – to the form, the National Voter Registration Form, that we need to act with the states having that ability to change their instructions. And because of my concern, going even further, that we could possibly be disenfranchising as elections get closer to the time, making sure we don't disenfranchise voters, I definitely support this change on the instructions.

CHAIR RODRIGUEZ: Thank you. Commissioner Hunter?

VICE-CHAIR HUNTER: Madam Chair, Mr. Cortes just helpfully told me that the date of the last memo that includes the proper language for the Arizona form was a memo that Edgardo Cortes wrote on

December 14, 2007. Thank you, Mr. Cortes. And I've spoken on this matter numerous times and put out several statements, so I won't belabor the fact, due to our restrictions of time, but I continue to believe that the EAC has no discretion to not approve a proper state request to amend [132] the state form instructions. And, further, that the law is a good law unless and until it's overturned by the courts.

Thank you very much.

CHAIR RODRIGUEZ: Thank you, Commissioner Hunter. I'm in the process of drafting a statement that will fully articulate my position and reasoning for not voting to adopt the Arizona change. Is there further discussion?

All of those in favor of the change submitted by the State of Arizona indicate by saying aye. Opposed?

[Commissioner Gracia Hillman and Chair Rodriguez voted in opposition to the motion. The motion was defeated on a tie vote.]

****

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

[redacted]

No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., ET AL.,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are current and former Members of Congress whose names are listed in the Appendix. Members of Congress have a particular interest in seeing that federal statutes are properly interpreted and implemented. Because this case implicates Congress's intent in enacting the National Voter Registration Act of 1993, the views of *amici* are particularly relevant. *Amici* include the Ranking Member of the Committee on House Administration, which has jurisdiction over federal elections, as well as current and former members of the Committee on House Administration's Subcommittee on Elections and leading proponents of the National Voter Registration Act from the One Hundred Third Congress.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It is beyond doubt that Congress has "'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833 (1995)). Congressional enactments in the area of federal elections therefore "necessarily supersede[]" conflicting state laws or state laws that present ob-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties have lodged blanket consents to the filing of *amicus curiae* briefs.

stacles to the accomplishment of Congress's purposes and objectives. See, *e.g.*, *ibid.*; *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

Exercising its sweeping authority under the Elections Clause, Congress enacted the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.* NVRA provides citizens with a simple and uniform method for registering to vote. Congress's purpose in enacting NVRA is spelled out in the statute itself—*i.e.*, to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). NVRA's intent—uniformly understood by the proponents and opponents of the statute alike—was to create a uniform and streamlined method of voter registration.

To this end, NVRA requires States to allow registration by mail (42 U.S.C. § 1973gg-2(a)(2)), delegates to a federal agency—the Election Assistance Commission (EAC)—the authority to design a uniform "Federal Form" that States "shall accept and use" (42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2)), prohibits States from developing their own forms that impose onerous requirements on would-be voters (42 U.S.C. § 1973gg-4(a)(2)), and directs States to "ensure" that eligible applicants who return a valid mail voter registration form on time are registered to vote (42 U.S.C. § 1973gg-6(a)(1)(B)).

In 2004, however, Arizona voters adopted Proposition 200, a ballot initiative imposing voter registration requirements that conflict with NVRA. Proposition 200 requires documentary proof of citizenship before an eligible voter will be added to the rolls. Thus, even though NVRA compels States to "accept and use" the EAC-developed Federal Form, Arizona

will refuse to register an otherwise eligible voter who fully and properly completes the Federal Form *unless* that individual *also* satisfies additional, state-imposed requirements.

This treatment of the Federal Form by Arizona does not comport with the plain language of NVRA.[2] The procedural hurdles erected by Proposition 200 conflict with NVRA's requirement that States "accept and use" the Federal Form and interfere with Congress's establishment of a uniform, streamlined voter registration system. And if there were any doubt that NVRA's express terms prohibit States from imposing obstacles to registration like those at issue here, the Act's legislative history resolves that ambiguity in favor of the en banc Ninth Circuit's reading of the statute. In passing NVRA, Congress specifically considered *and rejected* an amendment that would have *authorized* the States to require documentary proof of citizenship. NVRA's opponents in Congress objected to the statute in its present form on the ground that it would bar the *same* additional steps that Arizona now requires. "Congress' rejection of the very language that would have achieved the result [that petitioners] urge[] here weighs heavily against [their] interpretation" of NVRA. *E.g.*, *Hamdan* v.

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[2] Given the clarity of NVRA's requirements and the patent incompatibility of Proposition 200 with federal law, this case presents no occasion for the Court to decide the general applicability of a "presumption against preemption" or whether the standards for preemption under the Supremacy Clause differ from those under the Elections Clause, as articulated in *Siebold* and progeny. Compare, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-81 (2011) (plurality op.), with *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009). Proposition 200 is preempted under even the preemption standard championed by petitioners.

Rumsfeld, 548 U.S. 557, 579 (2006); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

Accordingly, Proposition 200's documentary proof-of-citizenship requirements are preempted by NVRA with respect to, at the very least, eligible voters seeking to register using the Federal Form.

ARGUMENT

I. Proposition 200 Requires Additional Documentation Before Permitting Registration Of Eligible Voters Who Have Timely And Properly Completed The EAC-Developed Federal Form.

Even under petitioners' proposed preemption analysis, "[w]here state and federal law directly conflict, state law must give way." *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2577 (2011) (internal quotation marks omitted); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute."); see Pet. Br. 33-34. That straightforward principle is dispositive of this case: NVRA *requires* something that Proposition 200 *prohibits*—*i.e.*, the acceptance and use of the EAC-developed Federal Form for voter registration.

A. NVRA's Requirements

"[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). Thus, this Court's inquiry properly "begin[s] with the language employed by Congress and the assumption that the

ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (internal quotation marks omitted). NVRA's language is clear and unambiguous.

In enacting NVRA, Congress vested the EAC with the authority to "develop a mail voter registration application form for elections for Federal office"—*i.e.*, the Federal Form. 42 U.S.C. §§ 1973gg-7(a)(2), 15329. The statute specifies certain features that the EAC *must* include in the Federal Form and certain features that the EAC may *not* include. Compare 42 U.S.C. § 1973gg-7(b)(2) (requiring attestation and signature under penalty of perjury), with 42 U.S.C. § 1973gg-7(b)(3) (forbidding "any requirement for notarization or other formal authentication").[3] And the Act requires that States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1).

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[3] Petitioners' invocation of the *expressio unius* canon is unavailing. Cf. Pet. Br. 38-39. That Congress expressly prohibited "notarization or other formal authentication" requirements does not warrant the inference that *other* requirements are *not* prohibited, since the *expressio unius* canon "has force only when the items expressed are members of an 'associated group or series.'" That is not the case here. See, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Furthermore, "[w]e do not read the enumeration of one case to exclude another *unless* it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Ibid.* (emphasis added). In the context of this case, there is compelling evidence that Congress did "consider[] the unnamed possibility"—*i.e.*, that NVRA would prohibit additional state-imposed proof-of-citizenship requirements—and effectively said "*yes*" to it. The Conference Committee chose the House version of NVRA over the Senate version, eschewing a provision that would have reserved to States the ability to impose such requirements. See *infra* pp. 19-20.

NVRA also provides an overall direction for the EAC to follow in the course of developing the Federal Form. Specifically, the Federal Form "may require only such identifying information * * * and other information * * * as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). Petitioners repeatedly assert that "*States* can require voter registration applicants using the Federal Form to provide state-specific 'information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" *E.g.*, Pet. Br. 27 (emphasis added), 35, 40. But that ignores the statutory text: although States may establish State-specific *eligibility requirements* and ask the EAC to revise the Federal Form in light of those requirements, the statute unambiguously leaves it to the *EAC* to develop the Federal Form—and that includes determining what information is "necessary" to assess eligibility (and therefore what information the Federal Form asks of applicants). 42 U.S.C. § 1973gg-7(b)(1). States, in other words, must take the EAC-developed Federal Form as they find it.[4]

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[4] After Proposition 200 was passed, Arizona petitioned the EAC to amend the Federal Form to incorporate Proposition 200's additional proof-of-citizenship requirement. The EAC refused and further advised that, pursuant to NVRA, "Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." Letter from Thomas R. Wilkey, Executive Director, EAC, to Jan Brewer, Arizona Secretary of State (Mar. 6, 2006) (J.A. 181, 187).

As developed by the EAC, the Federal Form is a straightforward, streamlined application that fits on a single piece of paper that may be folded, stamped, and mailed. 11 C.F.R. § 9428.5. At all relevant times, the Federal Form has contained two items pertaining to citizenship:[5]

- An attestation signed under penalty of perjury that the applicant meets each of the eligibility requirements, including that of citizenship. See 42 U.S.C. § 1973gg-7(b)(2); 11 C.F.R. § 9428.4(b)(1)-(2).
- The question "Are you a citizen of the United States of America?" and boxes for the applicant to indicate whether the answer is yes or no. See 42 U.S.C. § 15483(b)(4)(A)(i).

Importantly, even when States design their own registration forms, they still must "accept and use" the Federal Form "prescribed by the [EAC] pursuant to section 1973gg-7(a)(2)." 42 U.S.C. § 1973gg-4(a)(1); see also 11 C.F.R. § 9428.3(c). NVRA thus requires that States "accept and use" the Federal Form *as developed by the EAC*.

Perhaps petitioners could have sought judicial review of the EAC's action and challenged directly the design of the Federal Form. See generally 5 U.S.C. § 704; ITCA Br. 19, 44-45. They did not do so. Now petitioners quibble with the procedures by which the EAC rejected Arizona's request to amend the Federal Form to include state-specific instructions reflecting the proof-of-citizenship requirement. Pet. Br. 17-19, 45. Their collateral attacks on the Federal Form are not properly before this Court. See Rule 14.1(a).

[5] The most recent version of the Federal Form is available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (revised Mar. 1, 2006).

B. Proposition 200's Requirements

Proposition 200 provides that county recorders, who are responsible for maintaining Arizona's voter registration rolls, "shall *reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[6] Proposition 200 § 4.F (J.A. 173) (emphasis added; capitalization omitted), codified at Ariz. Rev. Stat. § 16-166(F). Arizona "requires submission of proof of U.S. citizenship along with *whichever* application form the registrant submits." Separate Statement of Facts in Support of Mot. for Partial Summ. J. by Defs. State of Ariz. and the Ariz. Sec'y of State ¶ 9 (emphasis added), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Gonzalez_StatementofFacts.pdf; see also Letter from Jan Brewer, Arizona Secretary of State, to Paul S. DeGregorio, Chairman, EAC (Mar. 13, 2006) (J.A. 189) (affirming that "Arizona's county recorders [will] continue to administer and enforce the requirement that *all* voters" provide documentary evidence of citizenship) (emphasis added).

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[6] Evidence deemed "satisfactory" by Proposition 200 is limited to: (1) the number of the applicant's Arizona driver's license or other identification license issued after October 1, 1996, or the number of a driver's license issued by another State if the license indicates on its face that the applicant has provided satisfactory proof of citizenship, (2) a photocopy of the applicant's birth certificate, (3) a photocopy of the applicant's passport, (4) the applicant's actual naturalization documents (or the number of the certificate of naturalization, which the county recorder must verify), (5) "other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986," and (6) the applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number. Proposition 200 § 4.F (J.A. 173-175).

In other words, Arizona law requires the rejection of a properly completed Federal Form, even if the applicant is eligible to vote, unless that applicant *also* submits proof of citizenship that Proposition 200 deems "satisfactory."

C. Proposition 200 is not consistent with NVRA's "accept and use" requirement

1. Arizona may not reject the Federal Form on the ground that it does not contain what Proposition 200 would deem "satisfactory" proof of citizenship without violating the plain terms of NVRA's "accept and use" mandate. See 42 U.S.C. § 1973gg-4(a)(1). As the decision below explained, "on its face the NVRA does not give states room to add their own requirements to the Federal Form." Pet. App. 38c; see also *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 408 F.3d 1349, 1353 n.4 (11th Cir. 2005) ("The Act mandates that the states accept a particularly defined federal registration form * * * for purposes of registration for federal elections."); *Diaz* v. *Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006). When a State conditions acceptance of the Federal Form on additional state-imposed requirements, it interferes with "the clear directives of the mail-in registration processes protected by the NVRA." See *Charles H. Wesley Educ. Found.*, 408 F.3d at 1355.

2. It would seem obvious that Proposition 200—which directs Arizona's county recorders to "reject" even properly completed Federal Forms if they are unaccompanied by additional evidence of citizenship—conflicts on its face with Section 1973gg-4(a)(1)'s mandate that States "accept" the Federal Form. In ordinary usage, *rejecting* something is, after all, the opposite of *accepting* it. See *The Compact Oxford English Dictionary* 1549 (2d ed. 2000) (defining

"reject" as "[t]o refuse (something offered); to decline to receive or accept."); *Webster's New Int'l Dictionary* 1915 (3d ed. 1986) (equating "reject" with "decline to accept"). Peace is not war; black is not white; freedom is not slavery; and rejection is not acceptance. See generally G. Orwell, *1984*, at 2 (1949).

To circumvent this reality, petitioners go to great lengths to minimize Proposition 200's "shall reject" language. Indeed, they argue that Arizona actually does "accept the Federal Form," so that there is no inconsistency between Arizona law and NVRA. Pet. Br. 20; see also *id.* at 21, 27, 39-41. They even go so far as to say that "submission of the Federal Form without the requisite evidence of citizenship does not result in denial" of the application under Arizona law. *Id.* at 20. But the district court found otherwise. J.A. 251 ("If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was *rejected*[.]") (emphasis added) (cited at Pet. Br. 20). That factual finding is not only unassailable under the clearly erroneous standard of review, *Brown* v. *Plata*, 131 S. Ct. 1910, 1929 (2011), but also clearly *correct* in light of Proposition 200's plain language, Ariz. Rev. Stat. § 16-166(F).

Petitioners try to sidestep this finding. They assert that, while Arizona county recorders will request additional information from an applicant who submits a Federal Form unaccompanied by "satisfactory" evidence of citizenship, recorders do not reject the form outright. Pet. Br. 20, 27. But this hardly qualifies as *accepting* the Federal Form, which is what NVRA requires. In law as well as in life, "yes, but only if . . ." is another way to say "no": It is fundamental that a purported "acceptance" that changes or adds to the terms of an offer is a *rejection*. See, *e.g.*,

Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on * * * assent to terms additional to * * * those offered is not an acceptance but is a counteroffer."); 1 Williston on Contracts § 5:3 (4th ed. 2012) ("an answer purporting to accept upon condition is not an acceptance at all"); Corbin on Contracts § 3:28 (LexisNexis 2012) ("An expression that purports to be an acceptance, but is so expressed as to be operative as an acceptance only on a condition that is not specified in the offer, is not an acceptance at all."); Farnsworth on Contracts § 3:21 (4th ed. 2004) ("An attempt to add or change the terms of the offer turns the offeree's response from an acceptance into a counteroffer and a rejection of the offer.").[7]

NVRA requires Arizona to *accept* valid Federal Forms timely submitted by eligible applicants, whereas Proposition 200 requires election officials to *reject* those very same forms unless the applicant satisfies the "satisfactory" proof-of-citizenship requirement. Proposition 200 cannot stand because it conflicts with, and therefore is preempted by, NVRA's scheme for uniform, streamlined mail voter registration via the EAC-developed Federal Form.

Petitioners assert that the *EAC* lacks the authority to promulgate regulations that preempt State law. Pet. Br. 44-45. This may (or may not) be so. But

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[7] Petitioners also conspicuously fail to identify any limiting principle for their interpretation of "accept and use." Under Arizona's interpretation, a State conceivably could receive an applicant's Federal Form, place it in a file unread (or "use" it to line a bird cage), and then request the applicant to complete its own, State-specific registration form, all without violating NVRA. This would nullify Congress's intent in providing a uniform and streamlined voter registration process.

in all events, it is a red herring. Petitioners acknowledge (*e.g.*, *id.* at 13, 45), as they must, that the EAC has the authority to develop the Federal Form. 42 U.S.C. § 1973gg-7(a). It is *Congress*, by enacting NVRA, that required States to "accept and use" the Federal Form as developed by the EAC. 42 U.S.C. § 1973gg-4(a)(1).

3. Moreover, Arizona's refusal to accept the Federal Form violates NVRA in still another, independent respect. Pursuant to NVRA, each State "shall * * * ensure" that any eligible applicant who submits a "valid" mail voter registration form on time is registered to vote. 42 U.S.C. § 1973gg-6(a)(1)(B).[8] A Federal Form completed in accordance with the Federal Form's instructions (and *only* those instructions) is "valid" because state-imposed procedural requirements do not and cannot affect the validity of the Federal Form. See *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004) ("Congress simply did not allow the states to impose restrictions that would permit denial of an application that otherwise satisfies the federal re-

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[8] Petitioners argue (Pet. Br. 41) that 42 U.S.C. § 1973gg-6(a)(2), which requires election officials to "send notice to each applicant of the disposition of the application," also authorizes States to demand proof of citizenship as a matter of course from applicants using the Federal Form. A "disposition" is just that, however: the announcement of a result, not a request for more documentation. Congress meant what it said and said what it meant. See *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). As the EAC put it, election officials cannot "take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their [F]ederal application using a [S]tate form." Letter from Gavin S. Gilmour, Associate General Counsel, EAC to Dawn Roberts, Director, Division of Elections, Florida Department of State (July 26, 2005), quoted at J.A. 234.

quirements."), aff'd, 408 F.3d 1349 (11th Cir. 2005); *Ass'n of Cmty. Orgs. for Reform Now (ACORN)* v. *Edgar*, No. 95 C 174, 1995 WL 532120, at *1-2 (N.D. Ill. Sept. 7, 1995) (invalidating "Address Verification Form" rule because it "impos[ed] a requirement that [was] not authorized by" 42 U.S.C. § 1973gg-6(a)(1)). Yet Arizona fails to "ensure" the registration of eligible applicants who properly complete the Federal Form unless they comply with Proposition 200's proof-of-citizenship requirement.

The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002), confirms that conclusion. Arizona contended below (see Pet. App. 40c) that HAVA's information-verification provision, 42 U.S.C. § 15483(a)(5), means that a State may require applicants using the Federal Form to produce additional evidence of citizenship.[9] This argument fails to account for the distinction between verifying information that is *already* on voter registration forms and requesting *new* information. Under HAVA, States must reject voter registration forms that

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[9] HAVA's savings clause provides that "[e]xcept as specifically provided in [42 U.S.C. § 15483(b)] * * * nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws: * * * The National Voter Registration Act of 1993." 42 U.S.C. § 15545. Thus, even though HAVA gives States some discretion in implementing its provisions, 42 U.S.C. § 15485, and allows them to impose stricter "election technology and administration requirements," 42 U.S.C. § 15484, they may not establish requirements that are "inconsistent with the Federal requirements under [HAVA] or any law described in [§] 15545," *ibid.*, including NVRA. Proposition 200's proof of citizenship requirement is "inconsistent" with NVRA for the reasons given above and, accordingly, is not sheltered by HAVA.

do not include "in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or * * * in the case of any other applicant * * * the last 4 digits of the applicant's social security number." 42 U.S.C. § 15483(a)(5)(A)(i).[10] The Federal Form already includes a space for applicants to enter a "[v]oter identification number as required or requested by the applicant's state of residence." 11 C.F.R. § 9428.4(a)(6). HAVA therefore directs state election officials to use the applicant's identification number and match his or her other responses against the information in the State's motor vehicle agency database, 42 U.S.C. § 15483(a)(5)(B)(i), or the Commissioner of Social Security's database, 42 U.S.C. § 15483(a)(5)(B)(ii).

HAVA's verification procedure goes hand-in-hand with NVRA's unqualified "accept and use" provision and does not diminish the latter's force. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.") (internal quotation marks omitted); see also *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) ("[A]bsent 'a clearly expressed congressional intention,' ... [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substi-

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[10] "If an applicant * * * has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes." 42 U.S.C. § 15483(a)(5)(A)(ii).

tute.'"). Applicants using the Federal Form supply their driver's license or social security number in the space indicated (if they have one, *see supra* note 10), and States, after verifying the provided information to the extent possible, must "accept and use" the Federal Form by registering eligible applicants without requiring supplementation.[11] Read together, NVRA and HAVA allow States to match information supplied on the Federal Form with information in other databases, but forbid States from conditioning acceptance of the Federal Form on the receipt of other information (*e.g.*, documentary evidence of citizenship) that the Federal Form does not already require.

II. NVRA's Legislative History Supports Its Plain Meaning.

Consultation of NVRA's legislative history is unnecessary in view of the clarity of the statutory text. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). But if there were any doubt, the statute's legislative history would unam-

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[11] This does not mean that all successful registrants may cast their ballots without further ado. HAVA requires some first-time voters who register by mail to provide identification before they vote. 42 U.S.C. § 15483(b). Voters who supplied their driver's license or social security number on their registration forms, *see supra* note 10 and accompanying text, are exempt from this requirement if the State election official is able to match that number against existing identification records. 42 U.S.C. § 15483(b)(3)(B). All other voters must at some point exhibit an acceptable form of identification (or a photocopy of the same if voting by mail). 42 U.S.C. § 15483(b)(2)(A), (b)(3)(A). This could include "current and valid photo identification" or "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *E.g.*, 42 U.S.C. § 15483(b)(2)(A)(ii).

biguously confirm Congress's intent to preempt state-law proof of citizenship requirements. The history shows that Congress intended to create a uniform method of voter registration by mail that would be effective in all States, and specifically contemplated—and rejected—state efforts to require documentary verification of citizenship. Over the course of multiple Congressional sessions, the proponents of the legislation sought to bring uniformity to a patchwork quilt of voter registration laws and to prevent States from imposing burdensome requirements like that established by Proposition 200.

NVRA was developed "to establish national voter registration procedures for Federal elections." H.R. Rep. No. 103-9, at 1 (1993); accord S. Rep. No. 103-6, at 3 (1993) ("This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act."); *Young*, 520 U.S. at 275 (noting that NVRA creates "simplified systems for registering to vote in federal elections") (emphasis omitted). As proponents of NVRA explained, these national procedures would "streamlin[e] the voter registration process" administered by the States. 139 Cong. Rec. H2259 (daily ed. May 5, 1993) (statement of Rep. Bill Richardson). It was designed to "remov[e] many of the burdensome requirements found in some States and localities which impede the ability of a citizen to register to vote." 139 Cong. Rec. H2257 (daily ed. May 5, 1993) (statement of Rep. Martin Frost).

All involved in the legislative process understood that uniformity in these procedures was intended; thus, the Senate minority balked at NVRA precisely *because* it precludes additional state requirements.

See S. Rep. No. 103-6, at 52. Likewise, NVRA's opponents in the House decried the Act's goal of national uniformity. "In reality, this broad legislation exploits the motor-voter concept to nationalize all voter registration laws that are currently on the books in all 50 States." 139 Cong. Rec. H2265 (daily ed. May 5, 1993) (statement of Rep. Bob Livingston). See also H.R. Rep. No. 103-9, at 35 ("The bill limits the state's ability to confirm independently the information contained in voter registration applications[.]"). President George H.W. Bush had earlier vetoed a nearly identical bill in 1992 because it would have "forc[ed] [States] to implement federally mandated and nationally standardized voter registration procedures." 138 Cong. Rec. S9772-03 (daily ed. July 2, 1992) (vetoing S. 250, 102d Cong. (1992)).[12]

But the clearest evidence that Congress intended, through NVRA, to preclude State efforts to

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[12] Congress enacted NVRA against the background of the debates surrounding S. 250 and its associated House bills. See *Hearing on H.R. 2, Nat'l Voter Registration Act of 1993, Held Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong. 1-2 (1993) (describing earlier bills and noting several Members' doubt that there was "more [to] be said" about NVRA given that "[e]veryone kn[ew] about" it). Asked to opine on S. 250 in the course of those debates, the Department of Justice noted that the bill would "limit[] significantly the ability of the states to use a variety of techniques to verify the app[l]icant's identity and eligibility." S. Rep. No. 102-60, at 53 (1991); see also *ibid.* (acknowledging that the "extent to which S. 250 would preclude confirmation procedures" was "unclear," and surmising that, as a result, S. 250 might require registrars to accept any registration application that was "facially complete"). As DOJ's submissions establish, Congress was well aware that enacting NVRA would limit State-level verification procedures, and consciously chose to pass NVRA in spite of that.

require documentary proof of citizenship to register for federal elections is that Congress specifically contemplated—and rejected—allowing States to require such proof. Chief Judge Kozinski's opinion concurring in the judgment below carefully marshaled the "legislative history that supports reading 'accept and use' in the exclusive sense, which would preclude states from seeking additional documentation." Pet. App. 91c.

"'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *Cardoza-Fonseca*, 480 U.S. at 442-443; see also *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). The bill that ultimately became NVRA, H.R. 2, 103d Cong. (1993), passed the House without any allowance for States to require documentary evidence of citizenship. The Senate, however, passed the Simpson-Helms Amendment, which provided: "Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. S2897-04, S2901 (daily ed. Mar. 16, 1993). Senator Alan Simpson explained the purpose of this amendment: "It allows States to check documents to verify citizenship"—much as Arizona seeks to do now—and "simply makes clear that this bill must not be interpreted to stop any particular State from requiring documents." *Id.* at S2901.

The Conference Committee, however, rejected the Senate amendment and adopted the House version, finding that documentary proof "is not *necessary* or consistent with the purposes of this Act." H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.) (emphasis added). The Conference Committee expressed concern that the Senate version "could be interpreted by States to permit registration requirements that could effectively eliminate, or *seriously interfere* with, the mail registration program of the Act." *Ibid.* (emphasis added).[13] "These concerns lead the conferees to conclude that this section [*i.e.*, that added by the Simpson-Helms Amendment] should be deleted." *Id.* at 24. As Chief Judge Kozinski observed, "the conferees thus rejected the Simpson amendment * * * because the inclusive meaning of 'accept and use' was inconsistent with their vision of how the Act should operate." Pet. App. 93c.[14]

Senator Jesse Helms, who co-sponsored the Senate amendment, decried the Conference Committee's bill and urged its defeat because his amendment had been omitted. 139 Cong. Rec. S5739-01

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[13] The House and Senate Committees had previously determined that NVRA's provisions, such as the attestation requirement on mail voter registration forms, were "sufficient to deter fraudulent registrations." H.R. Rep. No. 103-9, at 10; S. Rep. No. 103-6, at 13 ("[T]he bill also provides that there will be sufficient safeguards to prevent an abuse of the system with fraudulent registrations.").

[14] This interpretation of NVRA's "accept and use" language is confirmed by the Congressional Record, which shows advocates for mail registration calling, as early as 1989, for "self-executing" registration forms. *Voter Registration: Hearing on H.R. 15, 17, and 87 Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 67 (1989).

(daily ed. May 11, 1993). However, the Senate agreed to the conference report by a vote of 62-36. *Id.* at S5748. Congressman Bob Livingston made a similar appeal on the floor of the House, urging his colleagues to recommit the conference report with instructions to include the Simpson-Helms Amendment. 139 Cong. Rec. H2265 (daily ed. May 5, 1993). As Congressman Livingston stated, "[NVRA] requires registration by mail, but it prohibits States from requiring notarization or authentication that may prove that you are who you say you are." *Ibid.* Members of the House—Congressman Livingston among them—worried that failure to allow States to impose a proof of citizenship requirement would encourage fraud. *E.g.*, *ibid.* (Rep. Livingston: "[NVRA] weakens existing State protection against fraud . . . ."); 139 Cong. Rec. H2273 (daily ed. May 5, 1993) (Rep. Cox: "Despite its benign name, this pernicious bill would make it nearly impossible to prevent ineligible people . . . from voting.").

Nevertheless, NVRA's simplified registration process—including its mail registration provisions—enjoyed strong and widespread support in the House. As Congressman Bernie Sanders succinctly stated in his remarks preceding the House's vote on the conference report, "it is right that when you want, you should have the opportunity to register by postcard." 139 Cong. Rec. H2259 (daily ed. May 5, 1993). The House accordingly rejected the Livingston motion to recommit by a vote of 253-170 (*id.* at H2275) and agreed to the conference report (*id.* at H2276).

There is no ambiguity here: Allowing States to require documentary proof of citizenship would do violence to this careful legislative balance struck by Congress. As Chief Judge Kozinski explained, the

legislative "history here consists of actions taken by legislative bodies"—*e.g.*, the Conference Committee's drafting decisions and the rejection of the Livingston motion by the House as a whole—"not just words penned by staffers or lobbyists." Pet. App. 94c. And this "Court has recognized that such drafting history *can* offer interpretive insight" when a statute is ambiguous. *Ibid.* "'Congress' rejection of the very language that would have achieved the result the [petitioners] urge[] here weighs heavily against [that] interpretation.'" *Ibid.* (quoting *Hamdan*, 548 U.S. at 579-80); see also *Doe* v. *Chao*, 540 U.S. 614, 623 (2004) (deletion of language that "would have covered" desired remedy "fairly seen * * * as a deliberate elimination of any possibility" of a court awarding that remedy). Arizona may disagree with Congress's legislative choices as a matter of policy, but it nonetheless must comply with NVRA's mandate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Congressman Robert A. Brady (Pa.), Ranking Member, Committee on House Administration

Congressman John Conyers, Jr. (Mich.), Ranking Member, Committee on the Judiciary, Subcommittee on the Constitution

Congressman Charles A. Gonzalez (Tex.), Committee on House Administration, Subcommittee on Elections

Congressman Raúl M. Grijalva (Ariz.)

Congressman John R. Lewis (Ga.)

Congresswoman Zoe Lofgren (Cal.)

Congressman José E. Serrano (N.Y.)

The Honorable Allan B. Swift, Chairman, Committee on House Administration, Subcommittee on Elections, One Hundred Third Congress

The Honorable Wendell H. Ford, United States Senate Democratic Whip and Chair, Senate Committee on Rules and Administration, One Hundred Third Congress

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

In The
Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., and JESUS M. GONZALEZ, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's precedent and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requires persons who are registering to vote to show evidence that they are eligible to vote?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and

[1] Pursuant to Supreme Court Rule 37.3, consents from all parties to the filing of this Amicus Curiae Brief accompany the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States.

Here, the Ninth Circuit ignored the fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope of Congress's power to regulate elections. MSLF believes that its focus on these issues will be useful to this Court in deciding the issues in this case.

SUMMARY OF ARGUMENT

At issue here is whether certain provisions of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-1973gg-10, preempt certain provisions of Arizona's voter registration identification law. Pursuant to the NVRA, a Federal Mail Voter Registration Form ("Federal Form") was developed. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA directs the States to "accept and use" the Federal form when registrations are submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2).

A State may, however, develop and use its own mail voter registration form that meets all of the criteria stated in 42 U.S.C. § 1973gg-7(b) for the registration of voters in elections for federal office. 42 U.S.C. § 1973gg-4(a)(2). The criteria in 42 U.S.C. § 1973gg-7(b) provides, *inter alia*, that a mail voter

registration form "may require . . . identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). Importantly, 42 U.S.C. § 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2). The Federal Form includes a statement specifying "each eligibility requirement (including citizenship)," 42 U.S.C. § 1973gg-7(b)(2)(A-B), and contains an "attestation that the applicant meets such requirement," signed "under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2)(C). Whether a State uses the Federal Form or its own form, the NVRA does not prevent a State from requiring more than this bare-bones minimum identifying information in order to assess the eligibility of an applicant for registration.

Arizona voters passed Proposition 200 in 2004. One provision of Proposition 200 required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. A.R.S. § 16-166(F). Proposition 200 also requires the county recorder to reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. *Id.*

Following the implementation of Proposition 200, Arizona has continued to "accept and use" both the Federal Form and Arizona's Form for voter registration purposes, although the State requires submission of

evidence of U.S. citizenship along with both the Federal Form and the State Form, whichever the applicant selects. State Petitioners' Br. at 20-21. In all respects, both the State and Federal Form incorporate the requirements of the NVRA. *Id.* The Arizona Secretary of State makes the Federal Form available to anyone who requests it. *Id.* In addition, that form is publicly available for downloading and printing. *Id.*

Thus, one of the issues below was whether Proposition 200, insofar as it requires more than an attestation under penalty of perjury to establish citizenship, or any other eligibility requirement, conflicts with the NVRA, and is, therefore, preempted. The Ninth Circuit erroneously held that Proposition 200's requirement that those seeking to register to vote confirm their citizenship status (A.R.S. § 16-166(F)) was preempted by the NVRA. *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc). The Ninth Circuit failed to apply traditional preemption jurisprudence and instead held that, when Congress seeks to regulate elections, any State law that does not operate harmoniously in a single procedural scheme is preempted by the federal law. *Id.* at 394. The Ninth Circuit determined that the NVRA did not allow States to add their own requirements to the Federal Form and, thus, Proposition 200's proof of citizenship requirement was preempted because it did not operate harmoniously with the NVRA. *Id.* at 401-03. Arizona sought, and this Court granted, certiorari to address the Ninth

Circuit's holding with respect to Arizona's proof of citizenship requirement. As demonstrated below, the Ninth Circuit failed to recognize that the Constitution gives Congress only a limited authority to regulate elections and, thus, erroneously created a new preemption test that ignores the principles of federalism.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ESTABLISHED A NEW PREEMPTION TEST THAT CONFLICTS WITH THE CONSTITUTION AND FUNDAMENTAL PRINCIPLES OF FEDERALISM.

The Ninth Circuit ignored the purposes of the Constitution's elections clauses, as well as the fundamental principles of federalism, when it determined that the NVRA, enacted pursuant to the Article I, Section 4, Clause 1 ("Congressional Elections Clause"), preempted Arizona's proof of citizenship requirements contained in Proposition 200 (A.R.S. § 16-166(F)). Instead, as demonstrated below, the Ninth Circuit incorrectly ruled that federalism concerns apply only to preemption of State law under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, not to preemption under the Congressional Elections Clause. Furthermore, the Court failed to address the other sections of the Constitution that relate to the regulations of federal elections. *See* U.S. Const. Art. II, § 1, cl. 2, 4; Art. I, § 2, cl. 1; and Amend. XVII, cl. 1.

The Ninth Circuit observed that preemption under the Supremacy Clause "must strive to maintain the delicate balance between the States and the Federal Government." *Gonzalez*, 677 F.3d at 392. However, the Ninth Circuit ruled that the right to regulate federal elections was not a right reserved to the States by the Tenth Amendment. *Gonzalez*, 677 F.3d at 392. According to the Ninth Circuit, only those sovereign rights that predated the Constitution could be reserved by the Tenth Amendment. *Id.*

As a result, the Ninth Circuit concluded that, because Arizona's authority to regulate such elections "arises from the Constitution itself," not from any right of retained sovereignty preserved by the Tenth Amendment, a court "need not be concerned with preserving the 'delicate balance' between competing sovereigns" in determining preemption under the Congressional Elections Clause. *Id.* Based upon this erroneous conclusion, the Ninth Circuit ruled that the Congressional Elections Clause is a "standalone preemption provision" and "establishes its own balance [between the State and federal government]. . . ." *Id.* Nothing could be less true or more destructive of liberty.

The Constitution requires a different outcome. The Constitution grants broad authority to the States to regulate elections, and limits Congressional control of elections, even federal elections. Therefore, the Ninth Circuit incorrectly created a new preemption test that was too deferential to Congress.

A. Federalism Is Fundamental To The Liberty Of The People.

The principles of federalism embodied in the Constitution are fundamental to the government created by the Framers. The federal system resulted from a "compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3 (1988).

It is axiomatic that federalism is integral to the protection of liberty:

> In the compound republic of America, the power surrendered by the people, is *first divided between two distinct governments*, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a *double security arises to the rights of the people*. The different governments will controul [sic] each other; at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 291 (Madison) (Clinton Rossiter ed. 1999) (all emphasis added).[2] Indeed, the

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[2] All citations to the Federalist Papers in this brief are from the same edition.

importance of the federal system to liberty was extolled by Hamilton as well:

> Power being almost always the rival of power; the General Government will at all times stand ready to *check the usurpations of the state governments; and those will have the same disposition towards the General Government*. . . . It may safely be received as an axiom in our political system that the *state government will in all possible contingencies afford complete security against invasions of the public liberty by the national authority*. Projects of usurpation cannot be masked.

THE FEDERALIST No. 28, at 149 (Hamilton) (all emphasis added).

Madison also explained that the federal system of dual sovereignty steered a safe passage between the perils of a large republic and the dangers of a small one. In large republics, Madison expounded that "the [federal] representative[s] [are] too little acquainted with . . . local circumstances and lesser interests." THE FEDERALIST No. 10, at 50 (Madison). In small republics, on the other hand, representatives may become "unduly attached to these [local interests], and too little fit to comprehend and pursue great and national objects." *Id.* Madison concluded that the federal system created by the Framers "form[ed] a happy combination in this respect" and promoted wise legislation at both the national and local level; "the great and aggregate interests being referred to the

national, the local and particular[,] to the state legislatures." *Id.*

In order to preserve this system, most powers were reserved to the States, and only enumerated powers in the federal government:

> The powers delegated by the proposed Constitution to the Federal Government, are *few and defined*. Those which are to remain in the State Governments are *numerous and indefinite*. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The *powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State*.

THE FEDERALIST No. 45, at 260-61 (Madison) (all emphasis added).

Thus, Madison explained that the State governments are an essential part of the federal system created by the Constitution:

> The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his

> appointment, and will, perhaps, in most cases, of themselves determine it.

THE FEDERALIST No. 45, at 259 (Madison).

In this federal system, the States may regulate what concerns the liberties of the people. Regulation of the integrity of electoral systems, as demonstrated below, is essential to ensuring the liberties of the people and is thus a compelling interest of every State. As a result, the Constitution grants broad authority to the States to regulate elections, and limits Congress's ability to regulate elections. Congress can only regulate elections under extraordinary circumstances. As a result, the principles of federalism require the federal government to make its intent to limit the ability of the State to regulate elections manifestly clear.

Today, the federal government, with its army of administrative agencies and vast financial resources, continues to push the limits of its Constitutional authority. Given these realities, State governments provide an increasingly important institutional check on potential abuses of federal power:

> [O]ur federal system provides a salutary check on governmental power. . . . [O]ur ancestors "were suspicious of every form of all-powerful central authority. *To curb this evil, they both allocated governmental power between state and national authorities*, and divided the national power among three branches of government. Unless we zealously protect these distinctions, *we risk upsetting*

> *the balance of power that buttresses our basic liberties.* In analyzing this brake on governmental power . . . the *diffusion of power between federal and state authority takes on added significance as the size of the federal bureaucracy continues to grow.*"

F.E.R.C. v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting in part) (internal quotations omitted) (all emphasis added). Accordingly, whenever there is a conflict between State and federal law, the principles of federalism should be applied to preserve the delicate balance between the two sovereign interests, which preserves the liberty of the people. THE FEDERALIST No. 51, at 291 (Madison).

B. The Constitution Grants The States Broad Authority To Regulate Federal Elections And Authorizes Congress To Regulate Federal Elections Only In Limited Circumstances.

Two sections of the Constitution relate to Congress's authority to regulate federal elections: the Congressional Elections Clause and Article II, Section 1, Clause 4 of the Constitution. Three clauses relate to the power of the States to regulate federal elections: Article I, Section 2, Clause 1; Clause 1 of the Seventeenth Amendment; and Article II, Section 1, Clause 2 (collectively "Voter Qualification Clauses"). All five of these sections reflect Congress's limited authority to regulate federal elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995)

("Hamilton expressly distinguished the broad power to set qualifications from the limited authority under the Elections Clause."). As a result, the Ninth Circuit erred when it determined that courts should apply a preemption standard more deferential to Congress when Congress seeks to regulate federal elections. *See Gonzalez*, 677 F.3d at 393-94 (holding that Congress has a plenary authority to supplant State election regulations and that State regulations are preempted if "the two statutes do not operate harmoniously in a single procedural scheme").

The Congressional Elections Clause authorizes Congress to regulate the elections of its own members, but only in extraordinary circumstances. U.S. Const., Art. I, § 4, cl. 1; *see* THE FEDERALIST No. 59, at 330-31 (Hamilton) (emphasis added). The Congressional Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Art. I, § 4, cl. 1. Hamilton described the Congressional Elections Clause as "that provision of the Constitution which authorizes the national legislature to regulate, *in the last resort*, the elections of its own members." THE FEDERALIST No. 59, at 329 (Hamilton) (emphasis added).

The Ninth Circuit failed to consider the very limited purpose and scope of the Congressional Elections Clause, *i.e.*, leaving to the States the regulation of

congressional elections and reserving to the federal government only such power as might be necessary to protect its existence from abusive election regulations. U.S. Const., Art. I, § 4, cl. 1. Indeed, the "[Constitutional Convention] submitted the regulation of elections for the Federal Government in the first instance to the *local administrations*; which in ordinary cases, and when no improper views prevail, may be *both more convenient and more satisfactory*[.]" THE FEDERALIST No. 59, at 330-31 (Hamilton) (emphasis added).

But the federal government also "*reserved* . . . a right to interpose, whenever *extraordinary circumstances* might render that interposition necessary to its own safety." *Id.* at 331 (emphasis added). Thus, the power to regulate congressional elections remained with the States, with only a residual power granted to the federal government for extraordinary circumstances. States were not entrusted with plenary control over congressional elections only because "every government ought to contain in itself the means of its own preservation." *Id.* at 330.

The fear was that "state Legislatures, by forbearing the appointment of Senators, may destroy the national Government." *Id.* at 332. Consequently, as a last resort in extraordinary circumstances, the Congressional Elections Clause allows the federal government to invade the States' inherent authority over elections in order to alter or amend State election laws that threaten the federal government's very existence. *Millsaps v. Thompson*, 259 F.3d 535, 539

(6th Cir. 2001) (citing *U.S. Term Limits*, 514 U.S. at 808-09 ("[T]he Framers sought to curb the potential for abuses by the States and to give the nascent national government the power to preserve itself.")). That is, without a reserved federal override, "the Framers feared that the existence of the federal government would depend upon the willingness of the States to hold federal elections." *Id.*

As demonstrated above, the original intent of the Framers was that the Congressional Elections Clause preserve the States' sovereignty to regulate elections. Congress would intrude on that sovereignty only minimally, and only then as a last resort in extraordinary circumstances. Thus, the Framers drafted the Congressional Elections Clause with an eye to maintaining the delicate balance between State and federal sovereignty. THE FEDERALIST No. 59 (Hamilton).

The limited power of the federal government to regulate elections is reflected in other parts of the Constitution, as well. *See* U.S. Const. Art. II, § 1, cl. 2, 4; Art. I, § 2, cl. 1; and U.S. Const. Amend. XVII, cl. 1. In order to fully understand how much authority Congress has to regulate elections, one must look to the Article II, Section 1, Clause 4 and the Voter Qualifications Clauses of the Constitution. Article II, Section 1, Clause 4 of the Constitution provides that Congress may "determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." As with the Congressional Elections Clause, Article II, Section 1, Clause 4

limits the power of Congress to regulate elections, and instead gives most of the control to the States.

Importantly, this provision does not grant Congress the power to regulate the "manner" of choosing presidential electors, as it does with congressional elections. As a result, Congress's power to regulate presidential elections is less than its power to regulate congressional elections. The manner of choosing presidential electors is left entirely to the States, and a State can choose not to grant the right to vote for presidential electors to its citizens. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). As this Court stated in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892):

> In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that

> congressional and federal influence might be excluded.

See also Igartua de la Rosa v. United States, 113 F. Supp. 2d 228, 239 (D. P.R. 2000), *rev'd on other grounds*, 229 F.3d 80 (1st Cir. 2000) (Noting that "Congress' power over Presidential elections is limited . . . the citizenry of the United States gave very little power to the federal government in dictating the mechanism by which Presidential elections may be held.").

Finally, the Voter Qualifications Clauses reinforce the broad authority of the States to regulate federal elections. Article I, Section 2, Clause 1 and Clause 1 of the Seventeenth Amendment provide that the voters for Representatives and Senators "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." U.S. Const. Art. I, § 2, cl. 1; U.S. Const. Amend. XVII, cl. 1. Article II, Section 1, Clause 2 provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." These two provisions expressly give the States the power to set the qualifications of voters for congressional elections because States have the exclusive authority over setting the qualifications of voters for State elections. *See* THE FEDERALIST No. 60, at 339 (Hamilton) (Stating that Congress's authority is "expressly restricted to the regulation of the *times*, the *places*, the *manner* of

elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."). As a result, "the States, under Article 1, Section 2 of the Constitution and the Seventeenth Amendment, are free to establish voting qualifications," if those qualifications "do not transgress the United States Constitution." *United States v. Louisiana*, 225 F. Supp. 353, 358 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).[3]

Article II, Section 1 also allows States to establish Constitutional voting qualifications for presidential elections because the States decide the manner of choosing presidential electors. *See McPherson v. Blacker*, 146 U.S. at 35. Requiring potential voters to prove U.S. citizenship while registering to vote is a constitutional voting qualification that Arizona is

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[3] Proposition 200 did not add an additional requirement for voting in federal elections that does not also apply to voting in state elections. *See* A.R.S. § 16-166(F). Thus, because Arizona's proof of citizen requirements apply equally to both kinds of elections, it does not violate either Article I, Section 2, Clause 1 or the Seventeenth Amendment. *Compare with Forsenius v. Harman*, 235 F. Supp. 66, 70 (E.D. Va. 1964), *aff'd*, 380 U.S. 528 (1965) (Three-judge panel of the district court holding that a state statute requiring filing of a certificate of continuing residence six months before voting in a federal general election was unconstitutional because "[t]he extra obligation offends the Federal Constitution by tasking the voter in an election for President, Vice President and Congress beyond what is asked of the elector in the choice of members of the House of Delegates." (citing Art. I, § 2 and U.S. Const. Amend. XVII).

empowered to establish. As a result, Arizona was acting within its broad authority to regulate elections when it passed Proposition 200.

The common principle among the sections of the Constitution relating to the regulation of elections is that the Federal Government may only regulate federal elections in extraordinary circumstances. This Court has recognized that principle, and has held that the power to regulate federal elections comes from a need for institutional protection. *See Burroughs v. United States*, 290 U.S. 534 (1934). In *Burroughs*, two defendants charged with violations of the Federal Corrupt Practices Act of February 28, 1925 challenged the Act as unconstitutional under Article II, Section 1 of the Constitution. This Court ruled the statute constitutional based on the "power of self-protection," that Congress possesses, which is "essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs*, 290 U.S. at 545. This is consistent with Hamilton's view that it is sometimes necessary for Congress to regulate federal elections, but only when governmental institutions are threatened. *See* THE FEDERALIST No. 59 (Hamilton) (emphasis added); *see also Buckley v. Valeo*, 424 U.S. 1, 236 (Burger, C.J., dissenting) (noting that *Burroughs* upheld election regulations intended to eliminate "the appearance and reality of corrupting influences" because they constitute "[s]erious dangers to the very processes of government.").

The Constitution grants broad authority to the States to regulate elections, and allows Congress to intervene only when necessary to preserve the federal government. The Ninth Circuit took the opposite stance, however, and held that "the states' authority to regulate federal elections extends only so far as Congress declines to intervene." *Gonzalez*, 677 F.3d at 410. As demonstrated above, the Ninth Circuit's decision is not supported by the Constitution nor this Court's precedent and should be reversed.

C. The Ninth Circuit's New Test To Analyze Preemption Under The Congressional Elections Clause Usurps The States' Role In Regulating Elections.

The Ninth Circuit failed to recognize the federalism principles inherent in the Congressional Elections Clause; Article II, Section 1, Clause 2; and the Voters Qualifications Clauses, and the limited purpose and scope of those provisions. As a result, the Ninth Circuit arbitrarily created its own new preemption test that accords substantial deference to the federal government and rides roughshod over the sovereign interests of the States, in derogation of principles of federalism. The Ninth Circuit's so-called "harmonious operation" test for Elections Clause preemption asks:

> If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and

> viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not *operate harmoniously in a single procedural scheme* for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

Gonzalez, 677 F.3d at 394 (internal citations omitted) (emphasis added).

As demonstrated above, however, the Constitution's elections clauses reinforce the principles of federalism and limit the authority of Congress to regulate federal elections. The Ninth Circuit should not have created a new preemption test that was deferential to the federal government just because this case involves the regulations of elections. In fact, the Constitution gives authority to regulate elections to the States, and Congress can only step in when there are "[s]erious dangers to the very processes of government." *Buckley*, 424 U.S. at 236 (Burger, C.J., dissenting); *see also* THE FEDERALIST No. 59, at 329-31 (Hamilton). The Ninth Circuit's "harmonious operation" test goes in the exact opposite direction that the Constitution requires.

The Ninth Circuit cited to several of this Court's previous cases to support its conclusion that "states are obligated to conform to and carry out whatever [election] procedures Congress requires." *Gonzalez*, 677 F.3d at 391. These cases, however, do not stand for that proposition. Instead, these cases reflect the limited authority the Constitution grants to Congress to regulate elections.

The Ninth Circuit cited to *Ex parte Siebold*, 100 U.S. 371 (1879). In *Siebold*, the plaintiffs were found guilty of violating federal statutes that made it an offense to interfere with election supervisors. *Id.* at 377-79. This Court upheld the statutes and stated that "[t]he due and fair election of these representatives is of vital importance to the United States." *Id.* at 388. The statutes, this Court explained:

> [R]elate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, *may be necessary to the stability of our frame of government.*

Ex parte Siebold, 100 U.S. at 382 (emphasis added). This Court recognized that Congress properly exercised its authority to regulate elections because the statutes were necessary to protect the federal government. This Court also recognized the importance of the State governments to the federal system, and stated that "[t]he true interest of the people of this country requires that both the national and State governments should be allowed . . . to exercise all the

powers which respectively belong to them according to a fair and practical construction of the Constitution." *Id.* at 394.

The Ninth Circuit also selectively quoted from *Colegrove v. Green*, 328 U.S. 549, 554 (1946), for the proposition that "power over federal election procedures is ultimately committed to the exclusive control of Congress." *Gonzalez*, 677 F.3d at 391 (internal quotation omitted). Contrary to the Ninth Circuit's belief, this Court, in *Colegrove*, did not state that Congress had the exclusive control over federal elections. Instead, this Court simply stated, in dictum, that "the Constitution has conferred upon Congress exclusive authority *to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.*" *Colegrove*, 328 U.S. at 554 (emphasis added). Consistent with the framers intent, this Court once again recognized that the Congressional Elections Clause gives Congress the authority to regulate elections only when necessary to protect itself. *Id.* This Court was not presented with an actual statute, however, and, thus, did not have to decide if Congress properly exercised its power under the Congressional Elections Clause. The issue presented in the case was whether it was appropriate for the judiciary to hear a case regarding the alleged unfairness of Illinois's congressional districts. This Court upheld the district court's dismissal of the

complaint because the issue presented was a political question.[4] *Colegrove*, 328 U.S. at 552.

The third case the Ninth Circuit relied on is *Foster v. Love*, 522 U.S. 67 (1997). At issue in *Foster* was the conflict between Louisiana's "open primary" statute, which allowed for Senators and Representatives to be determined before federal election day, and a Congressional statute setting the date for the biennial election for federal office. *Id.* at 38-69. This Court recognized that:

> Congress was concerned both with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years.

Foster, 522 U.S. at 73. Because Congress was concerned that an individual state could disrupt the federal system, and unduly influence the election of its members, this Court recognized that Congress properly exercised its power authorized by the Congressional Elections Clause.[5]

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[4] Furthermore, this Court only discussed Congressional regulation of elections to the House of Representatives, and did not discuss Congressional regulation of other federal elections.

[5] This Court recognized that Congress passed three different laws setting the date for the biennial federal election because there are three different clauses in the Constitution

(Continued on following page)

These three cases reinforce the principle that Congress has only limited authority over regulating elections. In *Colegrove*, the Court stated that Congress was in charge of ensuring that its members were elected consistent with the Constitution. In *Siebold*, and *Foster*, the Court upheld statutes that were passed to ensure the preservation and stability of the federal government. All three situations represent extraordinary circumstances where Congress legislated (or could legislate) for the limited purpose of ensuring its own preservation. Contrary to the Ninth Circuit's holding, this Court's precedent reinforces Congress's limited role in regulating federal elections. Therefore, the Ninth Circuit erred when it created its "harmonious operation" test that usurped the States' role in regulating elections.[6]

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governing congressional regulation of elections. *Foster*, 522 U.S. at 69-70. The three statutes were: 2 U.S.C. § 7 (setting the first Tuesday after the first Monday of November as the date to choose Representatives), 2 U.S.C. § 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. § 1 (doing the same for selecting Presidential electors). *Id.*

[6] Petitioners do not directly challenge the constitutionality of the NVRA under Congress's limited power to regulate elections. However, as Petitioners correctly point out, this issue will need to be addressed if this Court were to rule that Proposition 200 is preempted by the NVRA. State Petitioners' Br. at 46-56.

II. PROPOSITION 200 IS NOT PREEMPTED BY THE NVRA.

A When Congress Properly Exercises Its Limited Authority To Regulate Elections, A State Law Is Only Preempted When It Irreconcilably Conflicts With The Federal Legislation.

The Ninth Circuit misconstrued this Court's previous decisions to create a new self-styled "harmonious operation" test that is too deferential to Congress. As demonstrated above, the Constitution limits when Congress may regulate elections. When Congress does properly exercise its limited power to regulate elections, this Court has held that the exercise of that power must conflict with State law, and that both laws cannot be executed at the same time, for preemption to occur. For example, in *Siebold*, this Court held that "[w]hen [Congress] exercise[s] [its power under the Congressional Elections Clause], the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them." 100 U.S. at 384 (emphasis added). That is, Congress may pre-empt State laws, but only "so far as the two are *inconsistent, and no farther*." *Id.* at 386 (emphasis added). *Siebold* cautioned that when Congress exercises its Congressional Elections Clause power, "we are bound to *presume that Congress has done so in a judicious manner*; that it has endeavored to *guard as far as possible against any unnecessary interference with State laws and regulations*. . . ." *Id.* at 393 (all emphasis added). *Siebold* recognized and

applied principles of federalism and preserved the delicate balance of power between the States and the federal government, precisely what the Ninth Circuit specifically rejected.

Likewise, in *Foster*, this Court recognized that Congress's authority to regulate the time, place, and manner of federal elections is "paramount to those made by the State legislature." 522 U.S. at 69. But this Court then ruled that State laws "cease[ ] to be operative" only "if [the federal law] *conflict[s]* [with State law]," and only "*so far as the conflict extends.*" *Id.* (emphasis added). Thus, *Foster*, like *Siebold*, applied principles of federalism to preserve the delicate balance between State and federal power.

Moreover, in *Foster*, this Court very liberally construed "election," a key term in that case, in order to avoid a conflict. This Court refused to "pars[e] the term 'election' . . . down to the definitional bone." *Id.* at 72. Instead, this Court held that "election" meant the "combined actions of voters and officials meant to make a final selection of an officeholder," so long as, "if an election takes place, it may not be consummated prior to federal election day." *Id.* at 71-72. Unlike the approach of the Ninth Circuit, this Court's deliberate effort to construe a statute to avoid finding a conflict between State and federal law, if possible, acknowledges the important role of federalism in the interpretation of the Elections Clause.

This Court's approach in *Siebold* and *Foster* is the same as the approach taken in preemption cases

not involving the regulation of elections. Under the Supremacy Clause, federal law may be held to pre-empt State law where any of the three forms of pre-emption doctrine may be properly applied: express preemption, field preemption, and implied conflict preemption. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

When acting within constitutional limits, Congress is empowered to pre-empt State law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of express pre-emptive language, Congress's intent to pre-empt all State law in a particular area may be inferred. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court has recognized two types of implied preemption:

> [F]ield pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 98 (internal quotations and citations omitted). As demonstrated above, this Court applied the implied conflict preemption test in *Siebold* and *Foster*. *See Gonzalez*, 677 F.3d at 451-52 (Rawlinson, J., dissenting) (citing *Siebold* for the proposition that "The

laws of the state are preempted if, and only if, both cannot be executed at the same time," and noting that *Foster* "addressed an actual conflict between a state law and a federal law.").

Instead of following the lead of this Court's past decisions – by looking for a direct conflict between the NVRA and Proposition 200, and determining the extent of any such conflict – the Ninth Circuit created its own "harmonious operation" test in which such a conflict between State and federal law plays no part. Astonishingly, the Ninth Circuit opined that it had reached its novel test by "reading *Siebold* and *Foster* together." *Gonzalez*, 677 F.3d at 394. The Ninth Circuit, in fact, ignored *Siebold*, *Foster*, and this Court's other preemption jurisprudence and proceeded without considering Congressional intent or whether a conflict existed between the NVRA and Proposition 200.

Other circuits have correctly recognized that this Court has never applied a different preemption standard to election legislation and non-election legislation. For example, in *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985), the Seventh Circuit was confronted with whether the "Contested Elections Act," a federal ballot-counting provision, preempted State ballot-counting laws under the Elections Clause. Utilizing well-established Supremacy Clause analysis, the Seventh Circuit first ruled that none of the laws in question "so pervades the field that all competing principles of state law must yield." *Id.* at 1085. The Seventh Circuit then ruled that "a federal law

preempts state law only when the two inevitably conflict or the law contains an explicit preemption clause," and, therefore, held that "the Contested Elections Act neither conflicts with nor expressly preempts state rules." *Id.* (citing to the Supremacy Clause preemption cases of *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)). Thus, *McIntyre* properly applied the principles of federalism, as set out in Supremacy Clause preemption jurisprudence.

In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), the Sixth Circuit was asked to determine whether Tennessee's early voting system conflicted with federal statutes establishing certain days as federal election days. The Sixth Circuit noted that "under the Elections Clause, 'the states are given[ ] and in fact exercise wide discretion in the formulation of a system for choice by the people of representatives in Congress.'" *Id.* at 538 (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941) (alteration in original). Indeed, these "comprehensive words embrace authority [of the States] to provide a complete code for congressional elections." *Id.* at 539. This broad language empowers States "to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce

the fundamental right involved," which include "prevention of fraud and corrupt practices."[7] *Id.*

The Sixth Circuit then analyzed the Elections Clause preemption allegation by utilizing Supremacy Clause precedent. First, the Sixth Circuit ruled that "'[whether federal law preempts state law turns principally on congressional intent.'" *Id.* at 538 (quoting *Northwest Cen. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989)). In doing so, the Sixth Circuit started with "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[8] *Id.* (quoting *Rice*, 331 U.S. at 230).

The Sixth Circuit went on to note that a federal law preempts State law "when the two *actually conflict*" which occurs when "'compliance with both federal and state regulations is a physical impossibility,'" or

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[7] This ruling follows the original intent of the Framers that the Elections Clause conferred on the federal government only a limited residuary power to be utilized only as a last resort in extraordinary circumstances. *See* THE FEDERALIST No. 59 (Hamilton). It also reinforces the concept that control of elections, particularly the prevention of fraud and corrupt practices, has always been a power retained by the States to protect the liberty of their people and the fundamental right to vote in a representative democracy and to have one's vote count without illegal dilution. *See* THE FEDERALIST No. 45 (Madison).

[8] This once again reinforces the proposition that maintaining integrity by rooting out fraud and corruption in elections is a traditional power of the States, whether those elections are local, State, or federal.

when a State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting for the first proposition *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and for the second, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). In holding that there was no Congressional Elections Clause preemption, the Sixth Circuit observed that "all courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes." *Id.* at 545. Thus, *Millsaps* properly upholds and applies principles of federalism.

The Fifth Circuit, without mentioning the Supremacy Clause, utilized much of the same analysis as *McIntyre* and *Millsaps* in analyzing Elections Clause preemption: "[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (emphasis added).

To similar effect is *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). There, the United States contended that Missouri failed to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of [death or change in residency]," pursuant to the NVRA. *Id.* at 846. Missouri

defended, arguing that "although Congress has authority to disrupt the federal/state balance of authority over elections, in order to do so, Congress "must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 850 n.2 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)). The United States responded by offering the argument accepted by the *Gonzalez* court, that "the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states" and is, therefore, not subject to principles of federalism. *Id.* The Eighth Circuit, however, rejected the United States' argument:

> We . . . recognize regulation of federal elections could not have been technically reserved to the states by the Tenth Amendment, when such federal elections did not exist before the Constitution was established. . . . [A]lthough the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states . . . which existed before the Constitution was established, the text of the Elections Clause may arguably describe the *usual constitutional balance between the States and the Federal Government*. . . . If Congress intends to alter [that balance], it must make its intention to do so unmistakably clear in the language of the statute.

Id. (internal citations and quotations omitted) (emphasis added).

The Eighth Circuit did not ultimately decide this issue because it determined that the plain language of the statute did require Missouri to conduct a program to purge voters who had died or changed addresses: "[W]e need not decide whether the plain statement rule applies in the context of the Elections Clause [because] the NVRA utilizes the mandatory 'shall' followed by an active verb, requiring the states to 'conduct a general program.'" *Id.* Thus, there is "no ambiguity in Congress's intent[.]" *Id.* *Missouri* does, however, taken together with *Siebold*, *Foster*, *McIntyre*, *Millsaps*, and *Bomer*, illustrate that the Ninth Circuit stands alone in its reasoning and its abandonment of fundamental principles of federalism.

As demonstrated above, this Court, and several circuits, have applied the same preemption test to all federal legislation, and have never been more deferential to Congress just because it passed legislation regulating elections. It is clear from this Court's precedent, and how that precedent has been applied in every circuit that has addressed the issue other than the Ninth Circuit, that a State election regulation must irreconcilably conflict with federal law in order to be preempted. Because the Constitution restricts the power of Congress to regulate elections this Court should continue to recognize that Congress may only regulate elections in extraordinary circumstances. Thus, this Court should reverse the Ninth Circuit's decision in this case and make clear that the same preemption doctrine to all congressional legislation.

B. Proposition 200 Does Not Conflict With The NVRA.

There are "two cornerstones of . . . pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("ways in which federal law may pre-empt state law . . . turn on congressional intent"). The second cornerstone of pre-emption analysis is that "in *all* preemption cases" there is a presumption "that the *historic police powers* of the States were not to be superseded by [federal law] unless [this result] was the *clear and manifest purpose* of Congress." *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485) (quoting *Rice*, 331 U.S. at 230 (emphasis added)).

Importantly, there is a "presumption against pre-emption [that] is *rooted in the concept of federalism*." *Geier v. American Honda Motor Comp., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (emphasis added). This presumption serves to place preemption in the hands of Congress rather than the Judiciary:

> The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance . . . and its

> requirement that Congress speak clearly when exercising that power.

Id. (internal quotations omitted).

The NVRA provides that "[i]n addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(2). The NVRA does not prohibit requiring proof of citizenship documentation to be submitted with the mail voter registration form. The NVRA only requires that the mail voter registration form

> may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

Importantly, the NVRA only expressly prohibits "notarization or other formal authentication" on registration forms. 42 U.S.C. § 1973gg-7(b)(3). Therefore, the NVRA allows some States to require "such identifying information . . . as is necessary to assess . . . the eligibility of the applicant. . . ." 42 U.S.C. § 1973gg-7(b)(1); *see Kucana v. Holder*, 558 U.S. 233, 130 S.Ct. 827, 838 (2010) ("Where Congress includes particular

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and citation omitted)); *see also Gonzalez*, 677 F.3d at 447 (Rawlinson, J., dissenting). Proposition 200 requires what Arizona determines was necessary identifying information to assess the eligibility of those attempting to register to vote. This requirement does not conflict with the requirements of the NVRA.

Furthermore, the Ninth Circuit also ignored the text and purpose of the NVRA, coupled with the complementary Help America Vote Act ("HAVA"), 43 U.S.C. §§ 15301-15545, both of which reinforce the sovereignty of the States to regulate the integrity of the electoral process. The Ninth Circuit held that the NVRA's goal was to "streamline the registration process . . . " and "make it easier to register to vote." *Gonzalez*, 677 F.3d at 400-01 (internal citations and quotations omitted). But the Ninth Circuit failed to mention the equally important NVRA goal of maintaining the integrity and accuracy of the voting registration system. Congress's stated purposes in enacting the NVRA were fourfold:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

> (3) to *protect the integrity of the electoral process*; and
>
> (4) to *ensure that accurate and current voter registration rolls* are maintained.

42 U.S.C. § 1973gg(b) (emphasis added).

HAVA complements this NVRA provision. HAVA requires that States keep computerized lists of registrants, that those lists be "*maintained on a regular basis*," specifies how the maintenance shall be performed, and mandates that the States' election systems "shall include provisions to ensure that voter registration records in the State are *accurate and updated regularly*," including "[a] system of file maintenance that makes a *reasonable effort to remove registrants who are ineligible* to vote from the official list of eligible voters." 42 U.S.C. § 15483(a)(2), (a)(4) (emphasis added).

The NVRA and HAVA together make it quite clear that maintaining an accurate, up-to-date list of voters by regularly purging those who have changed addresses or are ineligible to vote is critical. Thus, Arizona's efforts to register only eligible voters and to purge those who are not is consistent with and does not conflict with the same goal enunciated in the NVRA and HAVA. But the Ninth Circuit, in the same way that it ignored fundamental principles of federalism, also failed to consider or address these important features of the NVRA and HAVA.

Finally, the Ninth Circuit gave no credence to Arizona's compelling interest in protecting the integrity of voting for legislators in State, local, and Federal elections. As this Court has often observed:

> "A State *indisputably has a compelling interest in preserving the integrity of its election process.*" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). *Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.* Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (all emphasis added).

Arizona is no less concerned with national elections for legislators to represent the interests of Arizona and its people than with State and local elections. Indeed, given the vast expansion of federal power into every aspect of life, Arizona must be especially careful in assuring that those elected to the Senate and the House are elected fairly, and without fraud, by voters who are eligible to vote.

As demonstrated above, Proposition 200 is not preempted by the NVRA. Arizona's proof of citizenship requirements do not conflict with the requirements set forth in the NVRA. In fact, the NVRA allows States to require identifying information that will assist in determining the eligibility of the applicant. Therefore, the Ninth Circuit incorrectly determined that Proposition 200's proof of citizenship requirements were preempted by the NVRA.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision to correct the grave errors made by that court and to reemphasize the importance of federalism to individual liberty.

Dated this 14th day of December, 2012.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-71

IN THE
Supreme Court of the United States

ARIZONA, *et al.*,
Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
and JESUS M. GONZALES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICI[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts representing parties or as amicus curiae, including cases involving constitutional and legal challenges to discriminatory state voter registration laws. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Hous. Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976);

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

White v. Regester, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). As such, LDF has a significant interest in ensuring the full, proper, and continued enforcement of the National Voter Registration Act of 1993.

The Leadership Conference on Civil and Human Rights is the nation's oldest and largest civil and human rights coalition, consisting of more than 210 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

The Anti-Defamation League (ADL) was founded in 1913—at a time when anti-Semitism was rampant in the United States—to advance good will and mutual understanding among all Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of the minority or the majority, and in ensuring that each individual re-

ceives equal treatment under the law regardless of race, ethnicity, or religion. Consistent with its mission, ADL opposes ballot access requirements that disproportionately affect the voting rights of racial or ethnic groups.

SUMMARY OF THE ARGUMENT

Recognized by this Court as the right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the right to vote is the cornerstone of our democracy. But America's relationship with the right to vote is a contested one, characterized by periods of expansion of the electorate often followed by efforts to contract voter access.

Against this historical backdrop, Congress enacted the National Voter Registration Act of 1993 (NVRA) to expand America's promise of democracy by the People by making voter registration opportunities more widely available and, ultimately, politically engaging, among others, the most marginalized in our democracy: people of color and the poor. 42 U.S.C. §§ 1973gg(a)(3), (b)(1). As intended by Congress, voter registration increased dramatically, with 20 million new voters, nearly half of whom were Black, registering between 1995 and June 1996. Widely recognized for its pivotal role in ushering in a new, but not complete, period of democratic expansion in this Nation, the NVRA also led to significant improvements in disparities in registration rates between people of color and Whites.

As explained more fully below, however, following record participation by voters of color in several recent election cycles, and the substantial growth of communities of color in the last decade, several

states, including Arizona, have adopted voting measures to diminish access to the vote by people of color.

Between 2000 and 2010, the number of Latinos in Arizona increased substantially, by 600,000, and Latinos now comprise 30 percent of the state's population. Citing a need to combat undocumented immigration, Arizona responded by adopting Proposition 200. This discriminatory measure requires county registrars to reject any application for registration that is not accompanied by certain types of documentary evidence of United States citizenship. While citizenship is a legal requirement to register and vote, laws like Proposition 200 erect onerous documentary proof requirements that inhibit the registration of eligible voters.

Although Arizona failed to identify a single instance in which an undocumented immigrant registered to vote or voted in the state, the impact of the law was clear: following the enactment of Proposition 200, Arizona rejected the registration applications of more than 30,000 individuals. Of these, nearly 17 percent were Latinos. The Court of Appeals, sitting *en banc*, struck down Proposition 200 as applied to the Federal Form, a nationally uniform voter application that applicants can use to register by mail, recognizing that Proposition 200 was both inconsistent with and preempted by the NVRA.

Amici write separately to make three key points. *First*, this amicus brief provides the historical backdrop against which the NVRA was enacted and details various discriminatory measures that were employed by a number of states to prevent voters of color and the poor from exercising their voting

rights. *Second*, this amicus brief describes the manner in which Congress, responding to this anti-democratic period of exclusion in American history, enacted the NVRA to usher in a period of electoral expansion. *Finally*, this brief argues that, absent full enforcement of the NVRA, measures such as Arizona's Proposition 200 will undermine the hard-fought progress that has been made in combating discrimination in our political process.

Accordingly, amici respectfully urge this Court to uphold the ruling of the Court of Appeals.

ARGUMENT

I. States have a long and well-documented history of discriminating against voters of color.

Nearly fifty years ago, in his speech proposing the bill that would become known as "the most successful piece of civil rights legislation ever adopted," Voting, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/ (last visited January 13, 2013), President Lyndon Johnson framed the challenge posed by our Nation's lamentable tradition of racial discrimination in voting:

> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.

President Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 281, 282 (Mar. 15, 1965), *available at* http://lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.

As leading historians have explained, the extension of the right to vote in America has been contested, characterized by expansions often followed by swift contractions; gains in political participation by communities of color are too often met with corresponding efforts to constrict the franchise. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* xxiii (2009). The fight for the vote for Black Americans provides a prime example of this phenomenon. No other democracy in the world has enfranchised a large group, then disfranchised it—and then re-enfranchised it. *See* Richard M. Valley, *The Two Reconstructions: The Struggle for Black Enfranchisement* 1-2 (2004).

A. Early federal efforts to enfranchise Blacks during Reconstruction were later undermined by state election laws.

Following the Civil War, Congress moved swiftly to establish widespread Black suffrage. Between 1866 and 1867, the percentage of Black males eligible to vote "shot up from .5 percent to 80.5 percent, with all of the increase in the former Confederacy." Valley, *supra*, at 3.

By 1870, the U.S. Constitution featured two new amendments, the Fourteenth and Fifteenth, enshrining the right to vote. *See* U.S. Const. amend. XIV, amend. XV. With those constitutional amendments,

the first Reconstruction, a period of democratic expansion, was well underway. "Black office-holding emerged very rapidly" during Reconstruction. Valley, *supra*, at 3. "About half of the lower house of South Carolina's legislature . . . was [B]lack; 42 percent of Louisiana's lower [state] house was Black; and 29 percent of Mississippi's state house was Black." *Id.*

But the abrupt end of Reconstruction in 1877 offers a bitter lesson about the consequences of failed political will to sustain comprehensive voting rights for voters of color. Following the demise of Reconstruction, states and localities in the Old Confederacy engaged in decades of "unremitting and ingenious defiance of the Constitution," by promulgating numerous measures designed either to prevent Blacks from voting, or to cancel out the effect of the Black vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

By the 1890s, only "a generation after the great expansion in Black voting and office-holding," Southern legislatures "extinguish[ed] voting rights for the great majority" of Blacks, as Congress dismantled Reconstruction-era statutes. Valley, *supra*, at 3. Indeed, "[a] House report from the Fifty-third Congress (1893-1895) demanded that 'every trace of reconstruction measures be wiped from the books.'" *Id.* at 1 (quoting H.R. Rep. No. 53-18, at 7 (1893)). Without the democratic protections of the Reconstruction-era statutes, discriminatory voting laws proliferated, as states implemented grandfather clauses, voter roll purges, poll taxes, strict voter identification requirements, and literacy and "understanding" tests—each of which was discriminato-

rily enforced against Black voters at the polls. *See generally* Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 413, 416-19 (2008) (tracing the history of voting rights discrimination in Louisiana to the present day). Specifically, "'the key disfranchising features of the southern registration laws were the amount of discretion granted to the registrars, the specificity of the information required of the registrant, the times and places set for registration, and the requirement that a voter bring his registration certificate to the polling place.'" Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. Pa. L. Rev. 2361, 2368 (1989) (quoting J. M. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 48 (1974)). To disfranchise voters of color further, states also tailored laws that disqualified people convicted of criminal offenses to apply to crimes thought to be committed by newly freed Blacks but not by Whites. *See Hunter v. Underwood*, 471 U.S. 222, 224-27 (1985) (striking down Alabama's 1901 felon disfranchisement law because it was enacted with a discriminatory purpose); Lawyers' Comm. for Civil Rights Under Law & The Sentencing Project, *The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States* 3-4 (2009), *available at* http://www.sentencingprject.org/doc/publications/publications/fd_UNMinorityForum.pdf.

In addition, states passed "second generation" barriers—a seamless continuation of the previous

discrimination, akin to "pour[ing] old poison into new bottles," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part)—to prevent Black participation in voting. These efforts enabled county councils and school boards, for example, to use at-large elections to submerge newly registered minority voters within White majorities, draw racial gerrymanders, close or secretly move polling stations in minority neighborhoods, and employ countless other strategies to minimize the voting strength of voters of color. *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in Quiet Revolution in the South* 21, 22-27 (Chandler Davidson & Bernard Grofman eds., 1993).

Together, these schemes reduced minority participation to insignificance. By the early 1900s, the racially discriminatory application of these laws resulted in the disfranchisement of 90 percent of Blacks in the Deep South. *See* James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in Quiet Revolution in the South* 351, 354-56 (Chandler Davidson & Bernard Grofman eds., 1993). "In Virginia, the black electorate was reduced from 147,000 to 21,000. In Mississippi, after adoption of the post-Reconstruction constitution, 6% of eligible Blacks were registered to vote. One percent of eligible African-Americans were registered to vote in Alabama by 1902, compared with 75% of Whites." Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 Yale L. & Pol'y Rev. 370, 380 (1991).

Over the course of the 20th century, this Court slowly invalidated many of these state-sponsored discriminatory voting practices. Nevertheless, states continued to systematically exclude Blacks from the political process. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972) (striking down durational residency requirements for voter registration in Tennessee); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (declaring poll taxes an unconstitutional violation of the Equal Protection Clause); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (striking down Louisiana's provision of an "interpretation test" to prospective voters as an unconstitutional device designed to disenfranchise Blacks); *Smith v. Allwright*, 321 U.S. 649, 656-57, 664-65 (1944) (condemning the Democratic Party's practice of all-White primaries, which completely excluded Blacks from the political process).

B. The Voting Rights Act of 1965 abolished many of the barriers to full political participation for voters of color.

March 7, 1965 was a turning point, and a defining moment for civil rights in this Nation. That day, millions of Americans had their television programs interrupted with images of law enforcement officers brutally assaulting Black men, women, and children on the Edmund Pettus Bridge in Selma, Alabama. The demonstrators were peacefully protesting a state trooper's killing of a young Black man during a voter registration event. *See* David J. Garrow, *Protests at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* 61-62 (1978). A week later, President Johnson delivered a speech before a special joint session of Congress. He began:

> I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that. At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

President Lyndon B. Johnson, Address to Congress on the Voting Rights Act: We Shall Overcome (Mar. 15, 1965), *available at* www.historyplace.com/speeches/johnson.htm.

President Johnson described the now-infamous tactics employed to prevent Blacks from voting in the South, and he shared his first-hand experience witnessing discrimination against Mexican Americans in Texas. *Id.* He urged the passage of a new voting rights act, but recognized: "even if we pass this bill the battle will not be over." *Id.*

Congress responded by enacting the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 937, a milestone in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009). Widely regarded as the crowning achievement of the Civil Rights Movement, the VRA has proven to be one of the most successful federal civil rights statutes, if not statutes of any kind, in American history.

As a result of the VRA, Black registration rates rose dramatically and, consequently, the number of Black elected officials in this country increased nearly fivefold within five years after its passage. *See* H.R. Rep. No. 109-478, at 18, 130 (2006), , *reprinted in* 2006 U.S.C.C.A.N. 618. Today, there are over 9,000 Black elected officials. *Id.* at 18. Most of these officials are elected from districts that were created or protected under the VRA to remedy the dilution of the votes of communities of color. *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in Quiet Revolution in the South* 378, 381-86 (Chandler Davidson & Bernard Grofman eds., 1993). Significantly, the VRA helped lead to the election and then the re-election of the first Black President of the United States. *See* Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. Times, July 21, 2009, at A14, *available at* http://www.nytimes.com/2009/07/21/us/politics/21vote.html; *see also* Harry J. Enten, *White Voter Decline in 2012: The Conundrum Behind the Cliché*, The Guardian (Nov. 9, 2012), *available at* http://www.guardian.co.uk/commentisfree/2012/nov/09/white-voter-decline-2012-conundrum.

And yet, while the VRA has proven to be a powerful remedy, voting discrimination has persisted.

C. Black registration rates remained significantly lower than those of Whites even after the enactment of the VRA.

The VRA helped to raise Black registration rates in the South to 60 percent by the late 1980s. *See* Alt,

supra, at 354 & 374. But even with this powerful tool, Black registration and turnout rates continued to lag far behind those of Whites.

In the mid-1980s in Mississippi, for example, Black registration rates were 25 percentage points below White registration rates. *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1254-55 (N.D. Miss. 1987). In the late 1980s, people of color and the poor were overrepresented among the 47 percent of eligible voters who remained unregistered. *See* Cunningham, *supra*, at 385 & n.97. Voter turnout for people of color also remained extremely low, as only 37 percent of eligible Black voters went to the polls in 1994. *See* Nathan V. Gemmiti, Note, *Porsche or Pinto? The Impact of the "Motor Voter Registration Act" on Black Political Participation*, 18 B.C. Third World L.J. 71, 73 (1998).[2]

These low registration and turnout rates were attributable in part to the restrictive registration laws that traced their origins to the discriminatory laws described above. *See, e.g.*, Cunningham, *supra*, at 385-86 ("'[R]egistration requirements are a more effective deterrent to voting than anything that normally operates to deter citizens from voting once they have registered, at least in presidential elections.'") (quoting Stanley Kelley et al., *Registration and Voting: Putting First Things First*, 61 Am. Pol. Sci. Rev. 359, 362 (1967)). In a study published in 1980, 82 percent of nonvoters explained that they did not vote because they were not registered. *Id.* at

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[2] States were not mandated to implement the NVRA until 1996. 42 U.S.C. § 1973gg; *see also* Gemmiti, *supra*, at 96.

386 n.98 (citing William Crotty, *The Franchise: Registration Changes and Voter Representation, in Paths to Political Reform* 67, 524 (1980)).

Before the passage of the NVRA, states, particularly in the South, prohibited absentee voter registration, permitted only county registrars or their deputies to register voters, limited registration to the least convenient hours for potential voters, and maintained registrar locations far from where many voters lived. *See, e.g.*, Alt, *supra*, at 356 ("Even in 1970, of the eleven southern states only Tennessee and Texas had any provision for absentee registration, although twenty-seven of the thirty-nine non-southern states had such provisions."); Cunningham, *supra*, at 386 & n.99 (noting that "[i]n some rural areas where only one site is used for voter registration, potential voters . . . must travel distances of over 100 miles to register"); Quinlivan, *supra*, at 2374-75 & n.93 (listing states that give the local registrars discretion to appoint deputies; "this practice results more often in greater power to inhibit registration than in increases in the ease of registration"). To make matters worse, forty states and the District of Columbia permitted purges of voters from registration rolls if those voters did not participate in a certain number of past elections. *Id.* at 2374.

These barriers to registration disproportionately impacted, and often were originally intended to target, voters of color and the poor, many of whom lacked access to transportation to travel long distances at inconvenient times to register to vote. *See* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 Harv. C.R.-C.L. L. Rev. 393, 419-20 (1989). For instance, the 1980 Census found

that 42 percent of Blacks, but only 9 percent of Whites, lacked access to transportation in rural Arkansas. *Id.* at 419 (citing U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstracts of the U.S. Table 96, Arkansas 5-117-119 (1988)).[3] Moreover, people of color and the poor relied more heavily than Whites on voter registration drives—which were disfavored in many jurisdictions. *See, e.g.*, *NAACP, DeKalb Cnty. Chapter v. Georgia*, 494 F. Supp. 668, 670 & n.2, 673 (N.D. Ga. 1980) ("During the month of January, 1980, at all DeKalb County voter registration sites, 2,700 people were registered. On the other hand, during a one-day voter registration drive conducted by plaintiff League [of Women Voters] . . . approximately one and one-half times as many people were registered"); *cf.* Alt, *supra*, at 368 (noting that, by 1968, 60 percent of Blacks in southern majority-minority counties visited by federal ex-

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[3] The discriminatory impact of those state registration laws that required voters to travel long distances to register to vote is strikingly similar to that of Texas's voter photo identification law, which was rejected by a federal district court because it, among other things, required some rural voters to travel distances of over 200 miles to obtain acceptable identification. *Texas v. Holder*, No. 12-128, 2012 WL 3743676, at *27-29 (D.D.C. Aug. 30, 2012). A three-judge panel refused to preclear the law under section 5 of the VRA, *id.* at *1, finding that 13.1 percent of Blacks and 7.3 percent of Latinos lived in households without access to a motor vehicle, compared with only 3.8 percent of whites. *Id.* at *29. "If traveling over 200 miles constitutes a substantial burden on people without driver's licenses who can nonetheless find a ride to a [Department of Public Safety] office, . . imagine the burden for the predominantly minority population whose households lack access to any car at all." *Id.*

aminers were registered to vote, whereas only 28 percent of Blacks were registered in similar, but unvisited counties).

Finally, purges of voter registration lists also disproportionately affected voters of color and the poor because they were more likely to be inactive voters, to move inter-county between elections, or to be under-educated and, thus, less likely to respond to letters requesting that they update their registration. *See* S. Rep. No. 103-6, at 17-20 (1993) (recognizing that purges of nonvoters had a disparate impact on minorities); Cunningham, *supra*, at 391-95 (discussing illiteracy and local mobility's relationship to discriminatory purges of voter rolls).

VRA litigation successfully challenged some, but not all, of these registration barriers. *See, e.g.*, *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 401, 412-13 (5th Cir. 1991) (affirming a district court's finding that Mississippi's dual registration system and prohibition on satellite registration violated the VRA and affirming the steps taken by the district court to cure those violations); *see also NAACP, DeKalb Cnty. Chapter*, 494 F. Supp. at 673, 676, 679 (holding that DeKalb County's refusal to allow the plaintiff-nonprofits to operate satellite voter registration sites beyond the county registrar's office was subject to the preclearance requirement of the VRA; and temporarily enjoining the county from blocking further third-party registration drives). During the same period, many in Congress recognized that broader, more meaningful voter registration laws were needed, and over the next 20 years introduced more than 44 reform bills. *See* Cunningham, *supra*, at 387-88 (discussing the various pro-

posed bills); Gemmiti, *supra*, at 89-94 (describing efforts to enact voter registration reform).

II. Congress enacted the NVRA in response to persisting discriminatory voting laws and to equalize access to voter registration.

Finally, after numerous attempts to expand the electorate and address longstanding and widespread discrimination in the voter registration context, Representative Al Swift (D-WA) introduced the NVRA in 1993. *See Voter Registration: Hearing Held Before the H. Subcomm. on Elections, Comm. on H. Admin.*, 103rd Cong. 1-2 (1993) (statement of Rep. Swift). Representative Swift, who authored the NVRA, explained the bill's purpose as:

> the eradication of a rather unfortunate tradition in this country. We have used voter registration mechanisms in the United States throughout many, many decades to prevent various groups who were from time to time and by certain groups considered undesirable, to make it very difficult for them to vote. At various times those have been eastern Europeans and southern Europeans, the Irish, African-Americans, and others.

139 Cong. Rec. H505, H506 (daily ed. Feb. 4, 1993) (statement of Rep. Swift).

A. The NVRA is a civil rights statute designed to increase voter registration among people of color and the poor.

The NVRA sought to eliminate barriers to registration and to affirmatively "increase the number of eligible citizens who register to vote in elections for

Federal office." 42 U.S.C. § 1973gg(b)(1). It was also adopted as a special effort to reach "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with [motor vehicle agencies]." H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140.

In particular, the NVRA requires states to make registration available: (1) "by application made simultaneously with an application for a motor vehicle driver's license," 42 U.S.C. § 1973gg-2(a)(1); (2) "by mail application" using the Federal Form prescribed by the Election Assistance Commission (EAC), 42 U.S.C. §§ 1973gg-2(a)(2), 1973gg-4; and (3) "by application in person" at sites designated in accordance with state law or state voter registration agencies, *id.* § 1973gg-2(a)(3). The Federal Form—a nationally uniform voter application that applicants can use to register by mail, *id.* §§ 1973gg-4, 1973gg-7(a)(2)—was in part designed to facilitate registration drives.

Section 7 of the NVRA sets forth further obligations of certain state offices as "voter registration agencies." H.R. Rep. No. 103-66, at 18-20; *see also* 42 U.S.C. § 1973gg-5. Section 7(a)(6) of the NVRA requires all state offices that provide Medicaid, food stamps, and other public assistance benefits, to provide their clients "a mail voter registration application form," and assistance completing the voter registration form, "with each application for [public] service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance." 42 U.S.C. § 1973gg-5(a)(6). The NVRA, which passed with broad bipartisan sup-

port and was signed into law by President Bill Clinton on May 20, 1993, Gemmiti, *supra*, at 95-96, also established limitations on voter purges. *See* 42 U.S.C. § 1973gg-6(d).

Significantly, in passing the NVRA, Congress recognized that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 1973gg(a)(3). In that spirit, Congress took steps to ensure that the NVRA could not be used by states to enact discriminatory laws, like Arizona's Proposition 200. In the Joint House-Senate Conference, members of Congress expressly rejected language from the bill that would have given states the power to require individuals to provide documentary proof of citizenship in order to register to vote. *See* Gemmiti, *supra*, at 95 n.252 (citing Richard Sammon, *Deal May Speed Up "Motor Voter,"* Cong. Q. Wkly. Rep., May 1, 1993, at 1080).

B. Voter registration rates among people of color have increased significantly as a result of the NVRA.

As intended by Congress, voter registration increased dramatically following the NVRA's passage, with 20 million new registrants, 9 million of whom were Black, being added to the voter registration rolls between 1995 and June 1996. *See* Robert Brown & Justin Wedeking, *People Who Have Their Tickets But Do Not Use Them: "Motor Voter," Registration, and Turnout Revisited*, 34 Am. Pol. Res. 479, 484-87 (2006); Gemmiti, *supra*, at 97. Widely recognized for its pivotal role in ushering in a new period

of democratic expansion in this country, the NVRA led to significant improvements in disparities in registration rates between people of color and Whites. *See* Gemmiti, *supra*, at 97.

Efforts to enforce the NVRA in states have also led to dramatic increases in voter registration in more recent years. In 2004, for example, Iowa improved its agency-based voter registration and experienced a 700 percent increase in registrations over the previous presidential election cycle as well as a 3,000 percent increase over the previous year. *See* Estelle H. Rogers, *The National Voter Registration Act: Fifteen Years On* 2 (2009), *available at* www.acslaw.org/sites/default/files/Rogers_-_NVRA_at_15.pdf.

Other states, however, have sought to frustrate the dictates of the NVRA, through measures similar to Arizona's Proposition 200, and have been required to comply with the statute by court order. Missouri, for example, was compelled by a district court to comply with the NVRA. *Id.* Following the implementation of the court order, state public assistance agencies collected 26,000 voter registration applications in just six weeks. *Id.*

And just last year, LDF won partial summary judgment in a challenge to Louisiana's failure to comply with the NVRA, with a court holding that the NVRA requires that all public assistance clients be provided with a voter registration application, whether they seek benefits in person or remotely by the internet, telephone, or mail. *Ferrand v. Schedler*, No. 11-926, 2012 WL 1570094, at *12 (E.D. La. May 3, 2012). In Louisiana, registrations from public assistance agencies had plummeted 88 per-

cent since the NVRA was first implemented, from 75,000 in 1995 to 1996 to a mere 9,000 in 2007 to 2008. *See* Pls.' Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Injunctive Remedy at 10, *Scott v. Schedler*, No. 11-926 (E.D. La. Oct. 5, 2012), ECF No. 372. After LDF filed this lawsuit, however, voter registrations through public assistance offices spiked, with the number of new registrations increasing as much as sevenfold from previous years. *See id.* at 8-9.

In recent years, the U.S. Department of Justice has also filed a number of lawsuits under the NVRA. *See, e.g.*, *United States v. Florida*, 870 F. Supp. 2d 1346, 1350-51 (N.D. Fla. 2012) (finding that a voter purge program in Florida "probably ran afoul" of the NVRA insofar as it identified many citizens as potential noncitizens); *United States v. Louisiana*, No. 11-470, 2011 WL 6012992, at *6 (M.D. La. Dec. 1, 2011) (denying in part the state's motion to dismiss claims that it failed to offer registration at public assistance agencies); Consent Decree, *United States v. Rhode Island*, No. 11-113S (D.R.I. Mar. 25, 2011), ECF No. 3 (consent decree requiring state officials to ensure that voter registration opportunities are offered at all state public assistance and disability services offices); Consent Decree, *United States v. Tennessee*, No 02-0938 (M.D. Tenn. Oct 16, 2002) (mandating that state officials develop and implement uniform voter registration application procedures and annual NVRA trainings for employees of state driver's licenses and public services offices). Notably, in 2008, after the U.S. Department of Justice raised concerns about the Arizona Department of Economic Security's compliance with Section 7,

the parties entered into an agreement establishing standards to ensure the proper implementation of the NVRA. *See Agreement Between the United States Department of Justice and the Arizona Department of Economic Security Concerning Standards and Monitoring of Compliance with the National Voter Registration Act of 1993* (May 15, 2008), http://www.justice.gov/crt/about/vot/nvra/az_nvra_moa.php.

The prominent role that the NVRA has played in increasing registration and turnout rates among low-income voters, who are disproportionately persons of color, is significant. Between 2007 and 2010, an astonishing one million low-income people in five different states registered to vote as a result of NVRA enforcement. *See* Youjin B. Kim & Lisa Danetz, Demos, *1 Million New Voters Among the 99%: How Agency-Based Voter Registration Gives Low-Income Americans a Voice in Democracy* (2011), *available at* http://www.demos.org/sites/default/files/publications/Million_Mark_Demos.pdf.

III. Arizona's Proposition 200 is inconsistent with and preempted by the National Voter Registration Act.

Notwithstanding the long, exclusive, and sad history of voting discrimination in response to which Congress enacted the NVRA, and the important strides toward equality in the voter registration process that the NVRA has occasioned, Arizona has sought to return to the pre-NVRA era—and even the pre-VRA era—by mounting an assault on the voting rights of people of color, and Latinos in particular, through Proposition 200.

As noted earlier, between 2000 and 2010, the number of Latinos in Arizona grew significantly, by almost 600,000, from less than 1.3 million to approximately 1.9 million. *The State of the Right to Vote After the 2012 Election: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Nina Perales, Vice President of Litigation, Mexican American Legal Defense and Educational Fund) [hereinafter *Senate Hearing*] at 1, *available at* http://www.judiciary.senate.gov/pdf/12-12-19PeralesTestimony.pdf. Latinos now comprise 30 percent of the state's population. *Id.* In response to this demographic trend, Arizona voters, citing a need to combat undocumented immigration, adopted Proposition 200, a discriminatory measure that requires county registrars to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F).

For its part, Arizona failed to identify a single instance in which an undocumented immigrant registered or voted in the state. *Senate Hearing*, *supra*, at 3 (statement of Perales). The impact of the law was significant, however. Following the enactment of Proposition 200, Arizona rejected the registration applications of more than 30,000 individuals. *See Gonzalez v. Arizona*, No. 06-1268, slip op. at 13 (D. Ariz. Aug. 20, 2008). Nearly 17 percent of those rejected were Latinos, a figure measurably higher than the almost 14 percent of Latinos in the original registration applicant pool. *See id.*

Proposition 200 is foreclosed by the NVRA. *See Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc). As discussed above, Congress en-

sured that the NVRA could not be used by states to enact discriminatory laws, like Arizona's Proposition 200. Congress specifically rejected language in the bill that would have given states the power to selectively require individuals to provide documentary proof of citizenship in order to register to vote. *See* Gemmiti, *supra*, at 95 n.252 (citing Sammon, *supra*, at 1080). In so doing, Congress also sought to prevent states from discriminating against voters with "foreign sounding" names. *Id.*

The NVRA's preemption of discriminatory measures like Proposition 200 is especially important for Latinos in Arizona, who comprise the state's fastest-growing citizen voting-age population and who are engulfed in an often heated debate about immigrants from Mexico living in the state. *Senate Hearing*, *supra*, at 3 (statement of Perales). As Latinos in Arizona, and people of color more broadly, strive to overcome the effects of past exclusion from the political process, measures like Proposition 200 undermine that effort. Fortunately, the Court of Appeals, sitting *en banc*, struck down Proposition 200, correctly recognizing that it was both inconsistent with and preempted by the NVRA. *Gonzalez*, 677 F.3d at 388.

Democracy in America is contested and has been characterized by periods of progress and retrenchment. For nearly a century before the enactment of the VRA and NVRA, many jurisdictions held tightly to discriminatory practices that excluded people of color from equal political participation. The NVRA ushered in a period of democratic expansion and has been extraordinarily effective at leading our nation toward becoming a more inclusive democracy. Ari-

zona's Proposition 200, and other similar efforts that recall the discriminatory laws of the last century, threaten to undermine the hard-fought progress of the last fifty years.

CONCLUSION

For all of the reasons above, and those advocated by Respondents, we respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,
Petitioner,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals For the Ninth Circuit

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae*[1] is submitted, with the consent of the parties,[1] on behalf of the National Education Association (NEA); the Service Employees International Union (SEIU); and the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

NEA is a nationwide employee organization with more than three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA's governing policies "support[] voting . . . provisions that are accessible, simplified, accurate, reliable, and verifiable for all elections," and "oppose[] all actions that encourage or result in voter disenfranchisement." NEA Resolution H-3. In particular, NEA supports "uniform [voter] registration requirements without . . . restrictive identification requirements." *Id.*

SEIU is a labor organization which represents over two million men and women working in health care, property services, and public services throughout the United States. As reflected in its Mission Statement, SEIU is committed to building a civil society in which the voices of workers and their families are heard at every level of government in support of economic opportunity and social justice.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia and Puerto Rico. AFSCME advocates for fairness in the workplace, excellence in public services, and prosperity and opportunity for all working families. As a manner of achieving its objectives, AFSCME's membership is committed, "[b]oth as union members and as citizens," to "employ[ing] all available legislative and political action," including the exercise of the right to vote."

These organizations help working families throughout the country, including in Arizona, participate in the political process. A key element in that effort is support of nationwide activities to register eligible voters through organized voter registration programs and to remove barriers to voters casting their ballots in federal, and state, elections. This voter registration work has been facilitated by the procedures set forth in the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.*, and will be directly harmed by efforts, such as those at issue in this case, to undermine the effectiveness of those procedures.

INTRODUCTION AND SUMMARY

Congress passed the NVRA in an effort to establish certain basic and uniformly offered voter registration procedures to be used in federal elections, in response to what it perceived as the national problem of low voter participation, thereby easing voter registration processes while also ensuring the integrity of federal

electoral processes. To accommodate these competing objectives, Congress struck a precise balance, reflected in the creation of a federal form that the states would be required to accept and use to register voters in federal elections. The statute also allowed states to develop equivalent state forms, meeting the same federal criteria, that could be used in addition to the federal form in fulfilling federal procedural obligations. Arizona's Proposition 200 (Prop. 200) instructs its election officials to reject this federal form, as well as any state form, unless it is accompanied by additional documentation of citizenship—a requirement that Congress clearly rejected in enacting the NVRA. It is therefore plain that Prop. 200 conflicts with the NVRA's fundamental objectives, disrupts the careful balance Congress intended, and is therefore preempted.

The particular balance that Congress struck between streamlining the voter registration process and protecting against fraud is clear from the text and structure of the NVRA. With each provision of the law, Congress considered and weighed the risks of fraud and burdens on registration that such a provision would entail. In particular, when mandating the contents of forms for mail and in-person registration, Congress determined that potential voters should be required to provide *only the information that is necessary* to the registration process, and that, for federal registration purposes, an attestation by the applicant under pains of perjury is all that is required to establish that a voter in fact meets the substantive eligibility requirements set out in the form.

The text and structure of the NVRA are clear

enough to demonstrate Congress's intent to preempt laws such as Prop. 200 that establish a balance of relevant factors that differs from that which Congress intended. But the most authoritative legislative history places that conclusion beyond all doubt. Here, a provision that would have expressly allowed states to adopt laws such as Prop. 200 was considered and explicitly rejected *because such laws were viewed as inconsistent with the NVRA's intended objectives.*

Finally, the actions of the administrative agencies charged with carrying out the NVRA's requirements fully confirm Congress's intent as to precisely the issue here, once again expressly rejecting state efforts to impose these added proof requirements as inconsistent with the federal plan.

While this case has been presented as involving federal actions that arguably intrude on state constitutional prerogatives, that is simply not the case. There is not even an arguable conflict between the preemptive scope of the NVRA and the constitutional right of states to fix the substantive qualifications for electors in federal legislative elections. The NVRA's requirements that states accept properly completed federal registration forms (and state forms that satisfy the NVRA's criteria) is a permissible procedural regulation of the manner of voter registration in federal elections, and thus at the core of Congress's express power to establish federal election procedures. The NVRA simply does not alter any substantive qualification standards for electors set by the states.

ARGUMENT

I. PROP. 200'S DOCUMENTATION-OF-CITIZENSHIP REQUIREMENT IS PREEMPTED BECAUSE IT CONFLICTS WITH THE ACCOMODATION OF COMPETING INTERESTS THAT CONGRESS ESTABLISHED IN THE NVRA FOR THE REGULATION OF FEDERAL ELECTIONS

Resolving this case does not require the drawing of fine distinctions as to whether the standards for preemption under the Constitution's Elections Clause are more robust than those under the Supremacy Clause. Instead, Prop. 200's documentation-of-citizenship requirement as applied to registration in federal elections must fall under any standard of preemption because it interferes with the purposes and objectives of Congress clearly expressed in the NVRA.

It is evident from the NVRA's text, structure, and history—and confirmed by the actions of the agencies charged with administering the NVRA's requirements[2]—that Congress struck a balance of competing policies with regard to particular methods of voter registration for federal elections. That balance is, on the one hand, to enhance participation in federal elections by establishing streamlined procedures to increase the number of eligible citizens who regis-

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[2] *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (recognizing that agencies possess a "unique understanding of the statutes they administer" and "an attendant ability to make informed determinations about how state requirements" may conflict with "the full purposes and objectives of Congress.") (citations and quotation marks omitted).

ter to vote while, on the other hand, to protect the integrity of the electoral process by imposing meaningful, but not burdensome, safeguards to confirm voters' eligibility.

Prop. 200 upsets this balance. It "'stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (emphasis added) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (State law is preempted when it is an "'obstacle' to the accomplishment" of "important . . . federal objectives.") (citation omitted). And, it is therefore preempted by Federal law.

A. The NVRA's Preemptive Scope is Evident from the Language and Structure of the Statute

In its consideration of what would become the NVRA, Congress recognized that a major cause of the low rate of participation in federal elections was the fact that only 61% of eligible voters were registered to vote, and that the low voting rate among immigrant, poor, and black citizens could be attributed, at least in part, to a "complicated maze of local laws and procedures" for registering to vote. H.R. Rep. No. 103-9, 103d Cong., 1st Sess., at 3 (1993); *See also* S. Rep. No. 103-6, 103d Cong., 1st Sess. at 2-3 (1993). The House Committee declared that it was the "unfinished business of registration reform" initiated by of the 1965 Voting Rights Act "to reduce these obstacles to voting *to the absolute minimum* while

maintaining the integrity of the electoral process." H.R. Rep. No. 103-9 at 3 (emphasis added).

When Congress enacted the NVRA, it found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a). To address that concern, Congress announced that its solution would be guided by the following goals:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

Id. § 1973gg(b).

Between these stated purposes, there is an inherent tension. With every procedural requirement placed on citizens to verify that they are legally eligible to vote, an obstacle is created that must be overcome even by those who are fully qualified, making it more difficult to register to vote. Inversely, a decrease in verification requirements may increase

the risk that an ineligible person could obtain a place on the registration rolls. Faced with this dynamic, Congress chose the fraud-prevention measures that in its judgment could best be integrated into the voter registration procedures it was creating while still permitting eligible citizens to exercise their right to vote in Federal elections without undue registration burdens. Put simply, Congress established the precise balance that it deemed appropriate for resolving this inherent tension while achieving its stated goals.

Congress also authorized an administrative agency to create a uniform national voter registration tool, the mail voter registration form at issue in this litigation, in consultation with the chief election officers of the states.[3] This form, adopted after a full rulemaking process,[4] embodies the balance stuck by Congress by requiring that the applicant attest "under penalty of perjury" that he or she meets the voter registration requirements, specifically including "citizenship," and that the form prominently notify the applicant of the serious consequences of falsely signing such attestation. Having so ensured the

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[3] As originally passed, the NVRA vested this authority in the Federal Elections Commission (FEC). *See* 42 U.S.C. § 1973gg–4(a)(1). The responsibility for promulgating implementing regulations and developing voter forms was later passed to the Election Assistance Commission (EAC) by the Help America Vote Act of 2002 (HAVA). 42 U.S.C. § 15532.

[4] *See* Advanced Notice of Proposed Rulemaking 58 Fed. Reg. 51,132 (Sept. 30, 1993); Notice of Proposed Rulemaking, 59 Fed. Reg. 11,211 (Mar. 10, 1994); Final Rules, 59 Fed. Reg. 32,311 (June 23, 1994).

reliability of applicant representations, the form requires the applicant to provide "only" the information that is "necessary" to the registration process.

Congress also understood that it was regulating against a background of varied state voter registration laws that applied to both state and federal elections within each state. Accordingly, in enacting a limited federal voter registration scheme, Congress did not upset all state prerogatives in this area. Instead it left states free to use their own voter registration methods in contexts apart from the federally required procedures. But Congress unambiguously required, in the additional procedures which it was mandating for the registration of voters in federal elections, that the states "accept and use" both the federal form and the state's equivalent form.[5]

In particular, the NVRA required states to furnish three specific methods of registration in addition to any methods the state already provides: (i) by application at the same time as applying for a driver's license; (ii) by mail application; and (iii) by application in person at designated voter registration agencies 42 U.S.C. § 1973gg-2(a)(1)-(3). Two of the methods rely on the state making "available" and "accepting and using" both the federal mail voter registration form and a state's own form "that meets all

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[5] Of course, states choosing to develop their own mail-registration forms in compliance with the NVRA's requirements cannot do so to the exclusion of the federal form. A state may use its own NVRA-compliant forms only "[i]n addition to accepting and using" the federal form. 42 U.S.C. § 1973gg-4(a)(2).

of the criteria" of the NVRA.[6] *Id.* § 1973gg-4(a)(1)-(2), (b)

Arizona does not "accept" the federal form or any state form that would satisfy the NVRA's criteria; rather it "rejects" those forms in accordance with the unmistakable command of its election law. *See* Ariz. Rev. Stat. § 16-152(A)(23) ("[T]he Registrar shall reject the application if no evidence of citizenship is attached."). Simply put, Arizona has mandated a very different accommodation of the competing interests than that chosen by Congress, and Arizona has further commanded that its accommodation should control. A clearer case for federal preemption could not be made under any standard. Even a brief review of these required federal methods and the contexts in which they operate, reveals the starkness of the conflict between this state command and the federal plan.

When it was considering the NVRA, Congress recognized that twenty-seven states and the District of Columbia have some form of mail-in registration while

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[6] The third registration method the NVRA mandates—which is not directly involved in this case—is an application made in conjunction with obtaining or renewing a driver's license. 42 U.S.C. § 1973gg-2(a)(1). Congress imposed specific requirements on the states' use of forms for this purpose. To ensure that states did not make the process long and frustratingly redundant for the registrant, Congress mandated that the form "may not require any information that duplicates information required in the driver's license portion of the form." *Id.* § 1973gg-3(c)(2)(A). Congress also included protections against registration by non-citizens or otherwise ineligible individuals by requiring applicants to attest "under penalty of perjury" that they satisfied a federally mandated statement of the voting eligibility criteria of the particular state. *Id.* § 1973gg-3(c)(2)(C)(ii).

the other states required in-person registration, mostly at limited locations. *See* S. Rep. No. 103-6 at 12. In crafting a federal mail in registration form that must be used and accepted in every state, Congress struck a deliberate balance between ease-of-registration and preventing the registration of those ineligible to vote. To accomplish that balance, the NVRA places strict requirements on the two routes by which states can register voters by mail for participation in federal election.

First, the NVRA mandates that each state "shall accept and use" a federal mail-registration form prescribed by the EAC.[7] 42 U.S.C. § 1973gg-4(a)(1). In developing the federal form, the EAC was required to adhere to a strict set of statutory criteria that describe the contents and requirements of the form. *See id.* § 1973gg-7(a)(2), (b).

Second, "[i]n addition to accepting and using" the federal form, a state may develop and use its own mail-registration form. *Id.* § 1973gg-4(a)(2). The state's form, however, must meet the same statutory criteria required for the federal form developed by the EAC. *Id.* §§ 1973gg-4(a)(2), 1973gg-7(a)(2).

The NVRA'S criteria for both the federal form and any form developed by a state reflect a considered effort simultaneously to prevent the forms from being unduly burdensome while providing reliable safeguards against fraudulent registration. Congress expressly limited the information that could be required by these forms to "*only* such identifying . . . and other information . . . as is *necessary* to enable the appropriate State election official to assess the eligibil-

[7] *See* note 3, *supra*.

ity of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphases added).[8]

Congress also included specific requirements for the verification of voter eligibility that embody its minimalist "only . . . as is necessary" proof of eligibility standard. In particular, the NVRA requires that mail-registration forms must include:

- a statement that "specifies each eligibility requirement (*including citizenship*)";
- a statement of the "penalties provided by law for submission of a false voter registration application";
- an "attestation that the applicant meets each such requirement"; and
- a requirement for the "signature of the applicant, under penalty of perjury."

Id. § 1973gg-7(b)(2)(A)-(C), (4)(i) (emphasis added); *id.* § 1973gg–6(a)(5)(A)-(B).

Congress's balanced approach is also apparent in the NVRA's in-person registration provisions. These provisions require states to designate as "voter registration agencies" all offices that provide public assistance, and all offices that provide state-funded programs and serv-

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[8] This "only . . . as is necessary" standard is consistent with the policy of the bill that the initial House Report articulated: "to reduce . . . obstacles to voting *to the absolute minimum* while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9 at 3 (emphasis added). *See also id.* at 19 (discussing the same "only . . . as is necessary" language).

ices to persons with disabilities. *Id.* § 1973gg-5(a)(2). States are also given flexibility to choose additional public buildings and offices that would function as voter registration agencies. *Id.* § 1973gg-5(a)(3).

These voter registration agencies must supply each applicant for assistance or services with a written form notifying the applicant of his or her option to register to vote. *Id.* § 1973gg-5(a)(6)(B). In addition, the agency must furnish the applicant with either the federal mail-registration form or "the office's own form *if it is equivalent to the [federal] form.*" *Id.* § 1973gg-5(a)(6)(A)(ii) (emphasis added). Accordingly, the forms made available at voter registration agencies must embody the same balancing of competing interests that Congress struck in establishing the contours of federal and state mail-registration forms.

Congress's decision to mandate a sworn declaration upon penalty of perjury (to be made in the face of clear statements as to the penalties for false declarations) as the sole form of proof permitted or required to support a claim of citizenship is a paradigmatic example of the balance Congress struck in the statute. On the one hand, the affirmation upon penalty of perjury is a substantial method of assuring citizenship claims are valid—it is a form of proof accepted and used throughout the federal system to verify the most important claims, and carries with it serious penalties for false statements. On the other hand, a sworn declaration does not require the declarant who is making a truthful declaration to submit any additional materials, perform searches for documentary evidence, or otherwise take on additional burdens of verification or authentication.

The whole thrust of Congress's enactment is to provide for a simplified and non-burdensome system. The absence of any statutory requirement to submit additional documentation—or of any explicit allowance for a state to require the submission of additional documentation—can only be seen as a deliberate choice on the part of Congress.*

In every preemption case, "[t]he purpose of Congress is the ultimate touchstone" that guides this Court in determining a statute's preemptive effect. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (cita-

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* To call this balance an "honor system," as Arizona does here (Br. of Pet. Arizona at 43), is to ignore that the penalties for perjury can be severe indeed and that requiring declarations under such penalties is a legitimate, longstanding, and widely accepted method of ensuring the trustworthiness of evidentiary statements. *See* 28 U.S.C. § 1746; *see also* 18 U.S.C. § 1621 (providing for prosecution of perjury under federal law); Ariz. Rev. Stat. § 13-2702 *et seq.* (providing for criminal prosecution of perjury and related offenses under Arizona law).

Moreover, in addition to ensuring through the penalties of perjury that all mail-registration forms were truthfully completed, Congress allowed states an additional means of ensuring that voters are in fact eligible. Recognizing that the greater threat to electoral integrity was the fraudulent casting of a ballot, and that the history of some states may lead them to be particularly concerned by this threat, Congress empowered the states to require voters to vote in person if they were registering for the first time in a particular jurisdiction. 42 U.S.C. § 1973gg-4(c). For practical purposes, this requirement provides states with a major safeguard to ensure that they can prevent anyone from voting without personally appearing before a state official. Thus, the mail registration method balances these competing purposes to make registration easy and simultaneously take steps to prevent fraud.

tion and quotation marks omitted). Any determination of that intent must be "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). As this Court has explained:

> [T]he entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Id. (citation and quotation marks omitted). In light of the purpose, structure, and text of the NVRA, it is apparent that any proof of citizenship beyond the required attestation cannot be required, either as a predicate to accepting the federal form or as a requirement on any state form that must comply with the NVRA's requirements.[10]

When Congress enacts a detailed scheme that is plainly designed to accommodate and balance competing policy interests, state laws that alter the scheme and shift the balance in the name of strength-

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[10] Congress made a small change to the requirements for mail-registration forms when it enacted HAVA such that mail registration forms must now also include a check-box stating, "Are you a citizen of the United States of America?" 42 U.S.C. § 15483(b)(4)(A)(i).

ening one policy goal while undermining another are plainly preempted. Here Congress has adopted "detailed provisions" which implement conflicting policy goals and demonstrate that "Congress's calibrated . . . policy is a deliberate effort to steer a middle path" between competing statutory goals. *Id.* at 377-78 (citation and quotation marks omitted). *See also Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (concluding that "States are not free to change [the] structure and balance" of policy objective codified in federal law governing employee benefit plans); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (holding that a state may not "second-guess" how Congress's regulation of patents "strike[s] [a] balance in a particular circumstance"). In other words, where the "text, structure, and history" of the federal enactment reveal a "deliberate choice" by Congress to strike a "careful balance" of competing policy goals, a state may not seek to legislate a different balance—including one that "attempts to achieve one of the same goals as federal law" through a different method of enforcement. *Arizona v. United States*, 132 S. Ct. 2492, 2504-05 (2012). As this Court has recognized, a "'[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Id.* at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

The NVRA requires that the state *must* "ensure that [an] eligible applicant is registered to vote in an election" so long as he or she timely submits a "valid voter registration form" that complies with the requirements of the NVRA, whether by mail or through a voter registration agency.

42 U.S.C. § 1973gg-6(a)(1)(B)-(C). Neither method requires additional proof of citizenship. Nothing in the NVRA can be construed to permit Arizona to ignore these provisions and thereby frustrate the execution of the full purposes and objectives of Congress in enacting the NVRA. Prop. 200's documentation-of-citizenship requirement is therefore preempted.

B. Legislative History Confirms Congress's Intent as to the NVRA's Preemptive Scope

These conclusions regarding Congress's plan—and the incompatibility of additional documentation-of-citizenship requirements to that plan—are unmistakably demonstrated by the authoritative and directly relevant legislative history of this enactment. Congress not only adopted the NVRA with a clear understanding that it would preclude states from imposing documentation-of-citizenship requirements for specified forms of voter registration in federal elections, it explicitly considered and rejected a provision that would grant states precisely that latitude.

When the Senate considered the bill that would eventually become the NVRA, it passed an amendment to the House-passed bill to include a section entitled "Rule of Construction" that stated, "Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." H.R. 2, 103rd Cong. § 13 (as amended and passed by Senate, Mar. 17, 1993).

Immediately before the final passage of the NVRA, the Conference Committee of the House and Senate

met to reconcile the Senate version of the bill with the House version, which did not contain any provision analogous to the Senate's amendment. The Committee considered the inclusion of this provision, but it ultimately determined that the Senate's amendment upset the balance struck by the NVRA and undermined the purpose of the law:

> The conferees agree with the House bill and do not include this provision from the Senate amendment. *It is not necessary or consistent with the purposes of this Act.* Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well. . . . *These concerns lead the conferees to conclude that this section should be deleted.*

H.R. Conf. Rep. No. 103-66, 103d Cong., 1st Sess., at 23-24 (1993) (emphases added). This Joint Explanatory Statement of the Conference Committee was then distributed to members to inform them of "the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate." Standing Rules of the Senate, 103rd Congress, Rule XXVIII, ¶ 6.

Despite the agreement of the Conference Committee, a number of House members who were in favor of the Senate Amendment sought to add it back in to the text of the final bill. Congressman Livingston introduced a motion to recommit the bill

with instructions that the Conference Committee reinstate the Senate amendment. This motion failed the house by a vote of 170-253, and the bill then passed both houses without the Senate amendment. *See* 139 Cong. Rec. 9231-32, 9636, 9640-41.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation and quotation marks omitted). Congress's "rejection of the very language that would have achieved the result [Arizona] urges here weighs heavily against [Arizona's] interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

While legislative history can sometimes be an unreliable guide to the meaning of a statute's disputed provisions, that is not the case here. As Chief Judge Kozinski noted in his concurrence in the Ninth Circuit's rehearing en banc: "the history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists." *Gonzalez v. Arizona*, 677 F.3d 383, 441 (2012) (concurring opinion). Further, these were the final actions prior to the enacting vote of both houses, and the members had the Conference Committee's report of these actions before them prior to voting. These actions relate to exactly the interpretive and textual question at hand, and they reflect the explicit and considered Congressional judgment that what Arizona seeks is incompatible with the federal scheme.

Moreover, unlike the history that was objected to in *Hamdan*, this history cannot be characterized as

contradicting the plain meaning of the statutory language. *See Hamdan* 548 U.S. at 665-68 (Scalia, J. dissenting joined by Thomas and Alito, JJ.). To the contrary, it powerfully reinforces the most natural reading of the statutory text and the evident legislative purpose derived from the words of the statute. The understanding of the law articulated by the Conference Committee therefore confirms the interpretation of the NVRA that follows naturally from its purposes, structure, and text.

C. Congress's Preemptive Intent is Further Confirmed by the Actions of the FEC and EAC Implementing Key NVRA Requirements

The proper understanding of the NVRA's preemptive scope is also confirmed by the actions of the FEC and EAC, the administrative agencies charged with interpreting the statutory requirements for federal and state mail-registration forms under 42 U.S.C. § 1973gg-7(a).[11] Following the NVRA's statutory instructions, the FEC developed the federal form to include only those items that "are necessary to assess the eligibility of the applicant or to administer voter registration or other parts of the election process." 59 Fed. Reg. 32,311, 32,313 (Jun. 23, 1994) (originally codified at 11 C.F.R. pt. 8, now codified at 11 C.F.R. pt. 9428). After consultation with state election officials and input from the public, the FEC rejected items that did not meet this "necessary threshold." *Id.* at 32,316. In particular, while the FEC noted there were several items considered for inclusion that could be useful

[11] *See* note 3, *supra*.

for assessing eligibility, such as "place of birth" or "information regarding naturalization," they noted that these were not "necessary" and could lead to "unequal scrutiny." *Id.* The FEC concluded that:

> The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words "For U.S. Citizens Only" will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include this additional requirement.

Id.

Since the EAC has taken over responsibility for the federal form after the passage of HAVA it has not amended these regulations, in effect adopting the FEC's understanding and implementation of the NVRA.[12] Moreover, when Arizona's Secretary of State asked the EAC to apply Prop. 200's documentation-of-citizenship requirement to the Federal Form, the EAC's Executive Director replied that Prop. 200 was "preempted by Federal law" and that Arizona "may not mandate additional registration procedures that condition the acceptance of the Federal Form." EAC Letter to Ariz. Sec'y of State dated March 6, 2006 at

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[12] The FEC and EAC entered into a joint rulemaking to transfer the NVRA regulations from the FEC to EAC. *See* 74 Fed. Reg. 37,520 (July 29, 2009).

3.[13] The EAC further explained that "[n]o state may condition acceptance of the Federal Form upon receipt of additional proof." *Id.*

The regulatory actions of the FEC and EAC underscore that Arizona's law is in irreconcilable conflict with the NVRA. These actions reflect the agency's clear understanding of Congress's objectives and the incompatibility of Arizona's policy with those objectives, as reflected in the legislative history quoted above. *See Wyeth*, 555 U.S. at 577 (recognizing that agencies possess "unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines*, 312 U.S. at 67); *Geier*, 529 U.S. at 883 ("The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements.") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)).

D. Prop. 200 Upsets the Careful Balance Congress Struck in the NVRA

As all of the foregoing demonstrates, Prop. 200's challenged provision is inconsistent with Congress's "deliberate choice" to strike a "careful balance" of competing policy goals. *Arizona*, 132 S. Ct. at 2504-

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[13] Available at http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf

05. And, it is no defense to argue as the State does here, *see* Br. of Pet. Ariz. at 41-44, that Prop. 200's disputed provisions are consistent with one of the NVRA's statutory goals—protecting electoral integrity.

Avoiding preemption is not that simple. "[I]t is not enough to say that the ultimate goal of both federal and state law" is the same. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Here the prevention of election fraud is one of several competing goals, and Congress's method of advancing this goal was carefully tailored to accommodate the other important purposes of the federal law. In this situation it is especially apparent that a "state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id.*; *see also Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means."). The "[c]onflict in technique" occasioned by Prop. 200's documentation-of-citizenship requirements is so "disruptive to the system Congress enacted" as to amount to a "conflict in overt policy.'" *Arizona*, 132 S. Ct. at 2505 (citation and quotation marks omitted).

Regardless of whether Prop. 200 is analyzed according to the well-established demands of the Supremacy Clause, or by some heightened standard under the Election Clause, Congress's full purpose and intent must prevail. "The correct instruction to draw from the text, structure, and history" of the NVRA is that Congress decided it would be inappropriate to require additional proof of citizenship for registration for federal elections done by mail or through election registration agencies; "[i]t follows

that a state law to the contrary is an obstacle to the regulatory system Congress chose." *Id.*

II. THE NVRA DOES NOT TRENCH ON THE STATE'S CONSTITUTIONAL AUTHORITY TO ESTABLISH THE QUALIFICATIONS FOR ELECTORS

Arizona argues—for the first time before this Court—that the NVRA's preemptive scope must be narrowly construed to avoid difficult constitutional questions that arise due to a perceived conflict between the NVRA's registration requirements and the right of states under Article I, Section 2 and the Seventeenth Amendment to fix the qualifications for electors voting for Representatives and for Senators. *See* Br. of Pet. Ariz. at 46-53. Several of the state's supporting *amici* go even farther, arguing that a finding of preemption would in fact render the NVRA unconstitutional. *See* Br. *Amicus Curiae* of Ctr. for Constitutional Jurisprudence at 3-10; Br. *Amicus Curiae* of the Am. Civil Rights Union at 16-19; Br. *Amicus Curiae* of Landmark Legal Found. at 5-10.

As a threshold matter, this argument has been forfeited because it was not raised at any earlier stage in the case. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to address "new substantive arguments" that a party did not raise below); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (same with regard to new arguments raised by an amicus). At any rate, the argument is without merit. The NVRA's requirements that states "accept and use" a properly completed mail-

registration form is a permissible *procedural* regulation of the manner of voter registration; it does not alter the *substantive* qualification standards for electors set by the states.

The authority to enact regulations of times, places, and manner of elections under the Elections Clause is a "'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). It is, in this Court's words, an "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

The NVRA's integrated scheme for registration in federal elections fits comfortably within this broad power. *See id.* (including, as areas within this comprehensive federal authority, "registration" and "prevention of fraud" procedures). As detailed above, the NVRA mandates certain forms of registration in order to reach those qualified electors who might otherwise be unable or unlikely to register. It also facilitates those registration procedures through the use of either a single, simplified federal form or a state form that satisfies the federal

form's requirements that can be widely disseminated in state offices and by voter registration groups. Those forms require only the information that is "necessary" to enable an assessment of the applicant's eligibility (*i.e.*, qualifications) to vote, which are confirmed by an attestation that must be made on pains of perjury, in the face of a clear explanation of the gravity of and consequences attending to such an attestation. 42 U.S.C. § 1973gg-7(b). In other words, the NVRA's scheme is concerned entirely with procedural matters that involve *when*, *where*, and *how* voters may register for federal elections.

The history of the Elections Clause reflects that the Founders believed it was essential for the ultimate authority to regulate the manner of federal elections to reside with the federal government. As Hamilton explained, "Nothing can be more evident, than that an exclusive power in the state legislatures to regulate elections for the national government would leave the existence of the Union entirely at their mercy." THE FEDERALIST NO. 59, at 363 (Clinton Rossiter ed., 1961). Ultimate federal authority to regulate the manner of federal elections was therefore viewed as an expression of the basic precept that "every government ought to contain in itself the means of its own preservation." *Id.* at 362.

In contrast, the Constitution's grant of authority to states to fix the "qualifications" of electors deals solely with the question of *who* may lawfully vote. That is, voter "qualifications" set by the state have always been understood—including at the time enactment of Article I, Section 2 and the subsequent

ratification of the Seventeenth Amendment[14]—as being limited to substantive restrictions, unrelated to election procedures, describing the classes of people entitled to vote.

Given this settled understanding of the distinction between regulations affecting the "manner" of elections and those setting the "qualifications" of electors, as well as the Constitutional interests that underlie that distinction, there is no serious argument that the NVRA trenches on Arizona's right to fix the qualifications of electors. Arizona currently sets voting qualifications by restricting suffrage in all state elections to those who are (1) citizens of the United States, (2) at least 18 years of age, (3) residents of Arizona for at least twenty-nine days, (4) have not been convicted of a felony, and (5) have not been determined mentally incapacitated. Ariz. Rev. Stat. §16-101. These categorical distinctions as to *who* may vote are typical "qualifications" as that term is commonly understood and are similar to the qualifications set by many states.

The NVRA, of course, does nothing to alter or disturb these substantive standards for identifying the

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[14] In both the Eighteen and Nineteenth Centuries, voter qualification depended on many of the same substantive restrictions that are common today (such as age, residency, and mental fitness), as well as many restrictions that have since been invalidated (such as sex, race, religion, and holding of property). *See generally* Cortlandt F. Bishop, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 51-90 (1893); Albert McKinley, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 473-81 (1905).

characteristics of eligible voters in Arizona. Rather, the federal law provides only the procedural mechanisms for *when*, *where*, and *how* such voters must be registered. More importantly, the federal law provides adequate safeguards to verify the prospective voter's eligibility—first, by requiring the individual to attest under penalty of perjury to each criteria for voter eligibility and, second, by allowing states to require new voters to vote in person where documentary proof of eligibility can be required.

Because the NVRA does not interfere—or even arguably interfere—with Arizona's ability to establish substantive categories of who can vote, the federal law is a proper exercise of Congress's authority under the Elections Clause that must be upheld in the face of Prop. 200's conflicting requirements.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* OVERSEAS VOTE FOUNDATION, FEDERATION OF AMERICAN WOMEN'S CLUBS OVERSEAS, AMERICAN CITIZENS ABROAD, MILITARY SPOUSES OF MICHIGAN, AND ARIZONA STUDENTS' ASSOCATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

Overseas Vote Foundation (OVF) is the leading 501(c)(3) nonprofit, nonpartisan organization focused on supporting and facilitating electoral participation of overseas U.S. military and civilian voters. OVF provides the four to six million overseas voters, including more than one million affiliated with the Armed Forces, with access to state-of-the-art online voter registration and absentee ballot request services, emergency balloting assistance, interactive voter help desk access, and details regarding dates, deadlines, election office contacts, and candidate information. OVF is trusted and consulted by election officials; with millions of visitors to its affiliated and hosted websites during its eight years in operation, it is a heavily relied upon resource for voters and election officials alike. OVF is the only nongovernmental overseas organization that the Federal Election Assistance Commission links to on its homepage. Six states – Alabama, Kentucky, Ohio, Minnesota, New York, and Vermont – and two counties license complete, customized website services from OVF in order to better serve their overseas and military voters. The United States Postal Service and the National Association of

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[1] Letters from the parties consenting generally to the filing of briefs *amicus curiae* are on file with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Secretaries of State also license information services from OVF.

OVF is deeply concerned with aberrant state practices that undermine the uniform system of voter registration and ballot request established by the Federal Government. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) Federal Postcard Application and the National Voter Registration Act Federal Form are fundamentally endangered when states are allowed to overlay their own additional requirements. OVF has seen how these forms, when they lose their uniformity, also lose their efficacy. Allowing the UOCAVA and NVRA voter registration requirements to be tampered with would completely undermine UOCAVA and the NVRA. Of the many negative results that can be expected, one sure to occur is that OVF, and other organizations that work to support military and overseas voter participation, will face additional, and constantly changing, state-created obstacles as they seek to fulfill their mission of enfranchising overseas voters.

The Federation of American Women's Clubs Overseas (FAWCO) is an international network of independent volunteer clubs and associations. Founded in 1931, FAWCO promotes the rights of U.S. citizens abroad and has long been a strong advocate of improving overseas citizens' access to voting. FAWCO is also active as a nongovernmental organization with consultative status to the United Nations Economic and Social Council. Today, there are more than seventy-five member clubs in forty countries worldwide, with total membership exceeding 15,000.

In the decade following World War II, FAWCO began seeking solutions to the challenge of absentee voting from overseas; in the 1970s, it was instrumental in the passage of the Overseas Citizens Voting Rights Act, which guaranteed American civilians overseas the right to vote in federal elections. FAWCO is also a founding member of the Alliance for Military and Overseas Voting Rights, a group comprised of voting advocacy organizations and all branches of the military including military families and veterans.

In addition to advocacy, FAWCO partners with the Overseas Vote Foundation to provide online voter services to its members. FAWCO's efforts to ensure that overseas citizens can exercise their franchise will be impeded if state laws are allowed to undermine today's federally mandated uniform and streamlined process of voter registration.

Founded in 1978, **American Citizens Abroad** (ACA) is a nonprofit, nonpartisan, volunteer association whose mission is to represent the interests of Americans living overseas. Headquartered in Geneva, Switzerland, with offices in Washington, D.C., the association draws on more than three decades of rich experience and knowledge of laws affecting Americans living overseas.

Although Americans living overseas are impacted severely by a variety of U.S. laws and regulations, no governmental agency is responsible for informing Americans abroad of legislative and regulatory developments affecting them. Nor is there any effective mechanism in place to bring to the attention of Congress the issues affecting the daily lives of Americans overseas.

Building on a network of country contacts in over sixty countries and members in ninety countries, ACA is now the principal organization representing the interests of Americans residing overseas. ACA endeavors to inform and empower overseas Americans regarding issues of critical importance, including taxation, banking, voting, citizenship, Social Security, Medicare, and congressional representation. ACA favors the fullest expression of the right of all eligible Americans overseas to vote under federal law and therefore opposes measures that operate as an impediment to overseas voting. ACA regularly assists Americans worldwide in exercising their right to vote by means of online assistance, organization of voter information, "town hall" meetings, and periodic updates on potential threats to enfranchisement.

ACA is reorganizing as a U.S. tax-exempt organization operating under Section 501(c)(4) of the Internal Revenue Code.

Military Spouses of Michigan was founded in 2012 in response to the need for support and advocacy services for military spouses and family members. The organization provides pro bono legal advice and representation, educational opportunities, support networks, and access to information about employment and career support in Michigan. Military Spouses of Michigan keeps military spouses and families apprised of important state and federal changes or developments that affect the rights and benefits of servicemembers and their families, including their ability to register to vote and participate in elections. The organization also

encourages its members to advocate for legal and policy changes that protect our military community.

Military Spouses of Michigan submits that state laws that undermine the federally mandated uniform and streamlined process for voter registration make it more difficult for servicemembers and their families to register to vote. Such disenfranchisement of the military community impedes the community's participation in the democratic process and undermines its ability to choose representatives who will support legal and policy changes that protect the military.

The Arizona Students' Association (ASA), a nonprofit, statewide student advocacy organization founded in 1974, represents the 140,000 students attending Arizona's public universities. The organization's mission is to make college affordable and accessible by advocating student concerns to all levels of government and by showing grassroots support for student issues. ASA's board of directors, comprised of students from Arizona's public universities, is charged with accomplishing this mission through the creation of issue campaigns to engage students throughout the state. In 2012, ASA strongly supported student voter registration, helping to register 7000 new student voters.

ASA understands the power and impact that student voters can and do have in elections and therefore supports measures that help to amplify student voices. In working with Arizona students, including many who moved to the state to attend school, ASA has seen the benefits that the NVRA postcard offers and the challenges that would be presented if a uniform voter registration form were

not available. ASA believes that the NVRA postcard protects students' rights to participate in democracy and that Proposition 200's additional documentation requirement would disenfranchise students by creating additional and unnecessary obstacles to voter registration.

STATEMENT

Arizona's Proposition 200 requires all individuals to produce state-approved documentation to prove their citizenship in order to register to vote. This case raises the question whether Arizona's law is preempted by the mail registration provision of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg-4. That provision mandates that states "accept and use" the Federal Mail Voter Registration Form, *id.*, which requires that voters do only one thing to establish their citizenship: swear to their eligibility under penalty of perjury, *id.* § 1973gg-7(b).

The federal form that Arizona seeks to augment is a postcard (the "NVRA postcard") developed by the Election Assistance Commission.[2] *See* 42 U.S.C. § 1973gg-4(a); 59 Fed. Reg. 32,316 (June 23, 1994). In crafting this simple postcard, the Commission determined that citizenship would be adequately proven by "the oath required by the Act and signed by the applicant under penalty of perjury." 59 Fed. Reg. 32,316 (June 23, 1994).

The Commission's decision followed from the fact that Congress considered, and rejected, a version of the NVRA that would have permitted states to require the kind of documentation Arizona now

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[2] An electronic version of the NVRA postcard, which can be printed and mailed without an envelope, is available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf. U.S. Election Comm'n, *Register to Vote in Your State by Using This Postcard Form and Guide* (2006).

demands. *See* Pet. App. 91c-93c (Kozinski, C.J., concurring). Congress opted instead to "protect the integrity of the electoral process" and to "ensure that accurate and current voter registration rolls are maintained" by creating a registration process for federal elections that includes the ability to mail in a simple form. 42 U.S.C. § 1973gg(b)(3)-(4).

The Ninth Circuit, sitting *en banc*, held that the NVRA's registration process – specifically the requirement that states "accept and use" the NVRA postcard – "supersedes Proposition 200's" documentation requirement. Pet. App. 6c. The plain language of the NVRA "on its face" does not "give states room to add their own requirements to the Federal Form." *Id.* 38c. Moreover, the underlying purpose of the NVRA was to "streamline the registration process," *id.* 37c, and to replace a patchwork of "discriminatory and unfair registration laws and procedures," 42 U.S.C. § 1973gg(a)(3), with uniform "procedures that [would] increase the number of eligible citizens who register to vote in elections for Federal office," *id.* § 1973gg(b).

Amici represent two categories of individuals who have previously faced "discriminatory and unfair registration laws and procedures" and for whom Congress has gone to special lengths to ensure equal access to the political process: members of the Armed Forces and civilians overseas and college students. These groups' experiences parallel the experiences of a third category of citizens: elderly and disabled residents of long-term care facilities. The difficulties each of these groups face in complying with Arizona's documentary proof-of-citizenship requirement

reinforce the conclusion that the NVRA preempts Arizona's demand for additional documentation.

SUMMARY OF ARGUMENT

The National Voter Registration Act of 1993 (NVRA) streamlines voter registration for federal elections. Congress has repeatedly used its powers under the Elections Clause of Article I, § 4, and other constitutional provisions to ensure equal and uniform access to the political process. In the course of this history of legislation, Congress has evinced particular concern for groups whose circumstances make it difficult to vote. Overseas servicemembers and civilians, college students, and residents of long-term care facilities are each groups that have received special congressional protection.

Aberrant state laws and policies have, at times, impeded the voting rights of each of these groups. Acknowledging this problem, Congress enacted a federal regime of standardized election procedures that overrides these onerous state laws and prevents states from enforcing similarly burdensome provisions in the future. The NVRA is a central piece of this federal regime. Recognizing the federal interest in enfranchising these groups, courts have repeatedly held state laws that conflict with this federal regime to be preempted.

Arizona, however, has rejected this federal regime. When it passed Proposition 200, Arizona substituted its judgment for that of Congress in determining what burdens may be placed on would-be voters. The requirement that all voters provide specified documentary proof of their citizenship is especially burdensome for the groups discussed in

this brief. Congress's longstanding efforts to protect the voting rights of these groups is further evidence that Congress preempted laws like Proposition 200 when it passed the NVRA.

ARGUMENT

Congress has long recognized that effective participation in the political process encompasses a number of phases ranging from registering to casting a ballot to having that ballot properly counted. *See, e.g.*, 42 U.S.C. § 1973*l*(c)(1). As the first step in this process, voter registration is the gateway to everything that follows. Congress's passage of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq.*, reflects this understanding.

The NVRA is one piece of the larger federal scheme for ensuring, among other things, that *all* citizens – including members of the military, overseas civilians, college students, and residents of long-term care facilities – have the opportunity to participate fully in the political process. This regime includes constitutional provisions – most directly, the Equal Protection Clause and the Twenty-Sixth Amendment – as well as federal statutes, like the Uniformed and Overseas Citizens Absentee Voting Act, the Military and Overseas Voter Empowerment Act, and the Help America Vote Act.

Congress would not have gone to the trouble of enacting the NVRA to create a uniform national registration procedure if it had intended to permit states to fundamentally alter the federally prescribed procedure by promulgating new restrictions like Proposition 200. Congress's longstanding efforts to enfranchise servicemembers, college students, the

elderly, and people with disabilities make it all the more implausible that Congress intended to allow states to displace the NVRA's comprehensive requirements with their own different and more burdensome conditions.

I. The Obstacles To Registration For Members Of The Armed Forces That Proposition 200 Poses Reinforce The Conclusion That The NVRA Preempts It.

Throughout American history, the Federal Government has protected the voting rights of servicemembers. When state laws have impinged upon this federal interest, Congress has promulgated national standards that ensure members of the Armed Forces can participate fully in the political process.

This Court has also recognized the paramount federal interest in protecting servicemembers' right to vote. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court struck down a Texas law that barred citizens who moved to the state as servicemembers from registering to vote. The Court relied explicitly on the Equal Protection Clause, but the case has long been understood to express a broader proposition as well. Soldiers are "recruited by the national government to perform a crucial national function." Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 10-11 (1969). It therefore undermines the "national structure" and the idea of national citizenship, *id.* at 11, when states enact laws "[f]encing out" servicemembers, *Carrington*, 380 U.S. at 94. *See also Crandall v. Nevada*, 73 U.S. (6 Wall.)

35, 48-49 (1868) (developing a theory of national citizenship).

Proposition 200 impedes the ability of servicemembers overseas, and others similarly situated, to register to vote. Allowing it to stand would undermine the work that the Federal Government and this Court have done to protect servicemembers' voting rights – a consequence that is incompatible with Congress's passage of the NVRA.

A. Time And Again, The Federal Government Has Intervened To Protect Servicemembers From State Laws That Impede Their Ability To Register And Vote.

1. Beginning with the Civil War, the Federal Government has acted to enfranchise soldiers despite restrictive state laws to the contrary. Because several northern states refused to allow soldiers to vote absentee, President Lincoln went so far as to halt military operations to enable troops to return home to cast ballots. R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 Fordham Urb. L.J. 935, 948 (2007).

2. During World War II, the Federal Government outright preempted restrictive state laws in order to protect servicemembers' voting rights. In the Soldier's Vote Act of 1942, Pub. L. No. 77-712, 56 Stat. 753, Congress "intended to afford every opportunity" to servicemembers to vote "by removing those procedural requirements established by State law which in practical operation would tend to disenfranchise soldiers and sailors." S. Rep. No. 77-

1581, at 2 (1942). The Act directed the War Department to provide each soldier with a postcard that, if mailed to his secretary of state, would enable the soldier to obtain a ballot. Alvarez, *supra*, at 955. It also relieved servicemembers of the obligation to comply with state poll tax requirements, which operated at the time as part of the registration system in many parts of the South. *See* Virginia Foster Durr, *Outside the Magic Circle* 177-78 (Hollinger F. Barnard ed., 1985) (describing the registration function performed by the poll tax); Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. Ark. Little Rock L. Rev. 641, 651 (2004) (same).

3. Experience during the Korean War prompted further legislation. A 1952 report by the American Political Science Association found that when World War II-era federal protections expired, state laws once again burdened servicemembers' ability to participate in the political process. Am. Political Sci. Ass'n, *Findings and Recommendations of the Special Committee on Service Voting*, 46 Am. Pol. Sci. Rev. 512 (1952). For example, Texas did not allow military personnel to vote at all, six states once again required military personnel to comply with their in-person registration laws, two states had abolished absentee voting, and twenty states had short windows for requesting and returning ballots that effectively disenfranchised overseas servicemembers. Alvarez, *supra*, at 959-60.

Concerned that "our soldiers and sailors and merchant marines must make a special effort to retain their right to vote," S. Rep. No. 84-580, at 3 (1955), Congress passed the Federal Voting

Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584. That statute recommended states waive registration requirements entirely for military voters covered by the Act "who, by reason of their service, have been deprived of an opportunity to register." *Id.* It further urged states to accept a Federal Postcard Application "as a simultaneous application for registration and for [a] ballot." *Id.* § 102, 69 Stat. at 584-85; *see Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307-08 (N.D. Fla. 2000) (describing the Act).[3]

4. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Pub. L. No. 99-410, 100 Stat. 924 (1986). The Act consolidated the Voting Assistance Act and other federal laws governing overseas voting to create a uniform regime for active duty military and their families who are absent from the place of residence where they are qualified to vote because of their service and for civilian voters living overseas. The Act added new safeguards for these voters. With respect to registration, it created a Federal Postcard Application (the "UOCAVA postcard"), which serves simultaneously as a voter registration and absentee ballot application for groups covered by the Act. *Id.*

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[3] In 1968, Congress amended the Voting Assistance Act to include civilians residing abroad. *See* Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180, 180-81. Congress subsequently enacted the Overseas Citizens Voting Rights Act of 1975, which replaced the Voting Assistance Act's *recommendation* that states abolish burdensome residency prerequisites for overseas citizens with a *requirement* that they do so. Pub. L. No. 94-203, § 4, 89 Stat. 1142, 1143.

§§ 101, 104, 100 Stat. at 926. In 2001, Congress declared that military personnel must "receive[] the utmost consideration and cooperation when voting" and amended UOCAVA to *require* that states accept the UOCAVA postcard. National Defense Authorization Act of 2002, Pub. L. No. 107-107, § 1601, 115 Stat. 1012, 1274 (2001).[4]

5. In 1993, Congress passed the NVRA, which authorized creation of a simple Federal Form ("NVRA postcard") that all citizens, wherever located, can use to register. By requiring states to accept the NVRA postcard, the Act allowed all servicemembers to benefit from a streamlined registration process similar to the one that UOCAVA provided to troops stationed away from home.

6. In light of the federal commitment to full enfranchisement for servicemembers, courts have consistently struck down state laws that hamper servicemember voting. For example, in *Bush v. Hillsborough County Canvassing Board*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000), the court pointed to UOCAVA's "simplified procedure" for registration and voting to hold that Florida's policies for accepting or rejecting absentee ballots sent by overseas servicemembers violated federal law, *id.* at 1307. More recently, other courts have required states to

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[4] In 2009, Congress amended and strengthened UOCAVA with the Military and Overseas Voter Empowerment Act (the "MOVE Act"), which requires states, among other things, to transmit absentee ballots to UOCAVA voters a full forty-five days prior to a federal election. 42 U.S.C. § 1973ff-1(a)(8)(A).

bring their policies into compliance with federal law.[5] *See, e.g.*, *United States v. Georgia*, No. 1:12-CV-2230-SCJ, 2012 WL 4336257 (N.D. Ga. July 5, 2012) (requiring the state to comply with UOCAVA, as amended by the MOVE Act); *United States v. Alabama*, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (same); *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010) (same); *United States v. Cunningham*, No. CIV.A.3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009) (granting summary judgment for the United States and holding that Virginia's absentee ballot procedures violated UOCAVA).

B. The NVRA Preempts Proposition 200 Because Arizona's Law Reintroduces The Kinds Of Burdens On Servicemember Voting That Congress Has Repeatedly Condemned.

During the debates preceding passage of the NVRA, Arizona's own Senator, John McCain (himself a veteran), listed some of the reasons members of the Armed Forces face challenges registering to vote: "They are away from home. They are spread all over

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[5] Since 2000, the Department of Justice has filed twenty-five actions against states to enforce UOCAVA. *Civil Rights Division Voting Cases*, Department of Just., http://www.justice.gov/crt/about/vot/litigation/caselist.php#uocava_cases (last visited Jan. 15, 2013). Courts have issued preliminary injunctions in some cases. In others, courts have entered a stipulated order or consent decree. *Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, Department of Just., http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#vt_uocava12 (last visited Jan. 15, 2013).

the world. . . . Many [have] left home at an early age to join the military, some at age 18. Many of them have not been able to get home very often." 139 Cong. Rec. S2738 (daily ed. Mar. 11, 1993); *see also* Def. Manpower Data Ctr., *2008 Post-Election Survey of Uniformed Service Members: Tabulations of Responses for Active Duty Military* 9 (2009) (reporting that 35% of overseas troops were 18-24 years of age).[6] The NVRA and UOCAVA did much to address these challenges. Nonetheless, overseas troops (and their families) continue to report problems with registration at almost twice the rate of the general public. Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient* 7 (2012).[7] Allowing Arizona to impose registration requirements beyond what federal law itself authorizes would only exacerbate the registration challenges faced by military and overseas voters, especially troops deployed in war zones.

1. Proposition 200 has already prevented some members of the Armed Forces from registering to vote, despite the fact that these servicemembers followed the applicable federal registration process. Since implementing its law, Arizona has rejected otherwise complete UOCAVA forms because they did not include the documentation required under Proposition 200. Resp. Br. 16 & n.6.

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[6] Available at http://www.fvap.gov/resources/media/military_summary_data.pdf.

[7] Available at http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437

Under Arizona's regime, individuals who lack a recent Arizona driver license must submit additional documentary proof of citizenship with their voter registration form. This requirement poses four separate barriers for servicemembers. First, they must have physical access to one of the documents Arizona is willing to accept as proof of citizenship, which do not include military identification documents.[8] To the best of *amici*'s knowledge, while servicemembers nearly always carry military identification and often carry driver licenses or credit cards, troops in combat theaters seldom, if ever, carry passports or birth certificates. Moreover, because legal permanent residents may serve in the military, military identification does not constitute documentary proof of citizenship. Second, servicemembers must be able to copy their documents to comply with the state's requirement that no originals be submitted. Ariz. Dep't of State,

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[8] Arizona limits the documents that it deems to be acceptable proof of citizenship to the following: "the number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the [Arizona] department of transportation or the equivalent governmental agency of another state" if the license indicates that the applicant has "provided satisfactory proof of . . . citizenship"; a photocopy of a birth certificate; a photocopy of a United States passport; United States naturalization documents (which must be presented to the county recorder rather than photocopied) or number of the certificate of naturalization; the applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number; or documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986. Ariz. Rev. Stat. § 16-166(F).

Election Procedures Manual 308 (2012).[9] Third, troops who need to physically append additional documentation cannot use the UOCAVA postcard or NVRA postcard alone; they must instead track down mailing supplies. Fourth, because many citizenship documents reveal personal or confidential information about the holder, servicemembers may be concerned about the security of the mail service they use to transmit those documents.

Some troops may face all four of these barriers, while others may only encounter one. In any event, allowing Arizona's Proposition 200 to stand would contravene the intent of Congress and its commitment to enfranchise members of the Armed Forces.

2. Not only does Proposition 200 place unacceptable burdens on overseas troops, it also undercuts the military's role in domestic voter registration. The NVRA specifically designates military recruiting stations as voter registration agencies. 42 U.S.C. § 1973gg-5(c). For some potential voters, Proposition 200 makes it completely impossible for recruiting stations to facilitate registration: registrants whose documentary proof of citizenship is a naturalization document, which is illegal to photocopy, cannot be registered except at Arizona's own facilities by presenting the document in person. Ariz. Rev. Stat. § 16-166(F). The other registration avenue for individuals with a

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[9] Available at http://www.azsos.gov/election/Electronic_Voting_System/manual.pdf.

naturalization document is to write in their certificate of naturalization number, which then must be verified by the county recorder with the Federal Government before that individual will be added to the rolls. *Id.* In practice, however, this leads to automatic rejection of all such voter registration forms because naturalization certificate numbers cannot be verified by the Federal Government. Resp. Br. 21 & n.9.

Even with respect to aspiring voters who are not categorically foreclosed from registering through military recruiting stations, Arizona's law would pose difficulties. In order to ensure that Arizona does not reject qualified applicants, recruiting stations across the nation would have to provide photocopying services, postage, envelopes, and personal assistance beyond what the NVRA postcard demands. Doing these tasks imposes a burden on the military that Congress did not choose. *See* 42 U.S.C. § 1973gg-5(a)(4)(A) (listing services that shall be made available at voter registration agencies). Not doing these tasks undermines the NVRA's express goal of expanding registration opportunities, particularly for individuals considering military service. Under either scenario, Proposition 200 undermines federal interests.

3. When Congress passed UOCAVA in 1986, it extended the same protections to both overseas civilian and military voters. The expansion of this protection acknowledges that civilian voters face many of the same challenges in exercising their franchise as deployed servicemembers confront. *See, e.g.*, Overseas Vote Found., *2008 OVF Post Election UOCAVA Survey Report and Analysis* 5 (2009

(finding that 23.7% of experienced overseas voters, including both servicemembers and civilians, reported questions or problems relating to registration).[10] Proposition 200 threatens to compound these registration difficulties for overseas civilians in much the same manner as it exacerbates challenges for overseas military voters. For example, an Arizona resident serving as a Peace Corps volunteer in Africa could face many of the same barriers to voter registration as someone from the Armed Forces serving in Afghanistan. The Peace Corps volunteer may not have access to her citizenship documents, the ability to duplicate them, or a reliable, secure means of transmitting them to Arizona. *Cf.* Alison Lundergan Grimes, *Military Matters: Protecting the Rights of Those Who Protect Us* 3 (2012) (Kentucky's secretary of state reporting, for example, that mail service in Kuwait is unsecure and unreliable: "Indeed, embassy staff never send passports or visas through Kuwait mail, but require them to be picked up at the embassy.").

Other overseas civilian voters likely to be disenfranchised by Arizona's law include those whose U.S. passports have expired. This is not a rare occurrence for Americans abroad, particularly those with dual citizenship in a European Union (EU) country who can move about much of the EU without a passport. *See Documents You Need*, Eur. Union

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[10] Available at http://www.electionreformproject.org/Resources/effd46f2-7862-4b2e-b28a8f92a3070f48/r1/Detail.aspx.

(June 2012).[11] Those whose only citizenship documents are naturalization papers, which Arizona requires be presented in person at the county recorder's office (instead of copied and mailed in), would face even more insurmountable obstacles. And, of course, the destruction of uniformity caused by Proposition 200 also burdens many overseas groups, like some of *amici*, active in registering overseas voters.

II. That Proposition 200 Undermines The Federal Interest In Enabling Students To Vote Reinforces The Conclusion That The NVRA Preempts Arizona's Documentation Requirements.

The Twenty-Sixth Amendment expresses a constitutional commitment to the voting rights of young people. Many of today's most hotly debated issues – for example, reform of student loan and federal entitlement programs – will have an especially great impact on younger citizens. Contrary to Congress's decision in the NVRA to permit registration for federal elections on the basis of an applicant's sworn statement, Proposition 200 places substantial burdens on the many students who lack ready access to the documents Arizona requires.

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[11] Available at http://europa.eu/youreurope/citizens/travel/entry-exit/eu-citizen/index_en.htm.

A. In Recent Years Congress And The Courts Have Rejected The Historic Practice Of Preventing Students From Registering Where They Attend School.

1. The history of the Twenty-Sixth Amendment provides a powerful measure of the depth of the congressional commitment to enfranchising young people. Originally, Congress sought to accomplish this goal legislatively. In Title III of the Voting Rights Act of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318-19, Congress extended the franchise to all citizens between the ages of eighteen and twenty-one.

Congress provided two rationales for its decision. One focused on the perceived unfairness of drafting young men who lacked any voice in the political process. *See, e.g.*, 116 Cong. Rec. 20,176 (1970) (statement of Rep. Richard Ottinger). The second focused explicitly on college students. As Senator Mansfield explained: "The colleges and universities are filled with alert minds, eager, willing and able to participate. Permitting them to do so would be a large step forward." 116 Cong. Rec. 5951 (1970) (statement of Sen. Mike Mansfield); *see also* Kenneth J. Guido, Jr., *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. Rev. 32, 39 (1972) (tracing passage of 1970 Act).

While this Court upheld Congress's decision to lower the voting age for federal elections, it held that Congress had exceeded its powers when it did so with respect to state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). That decision prompted Congress almost immediately to propose,

and the states to ratify, a constitutional amendment extending the franchise in all elections to eighteen-year-olds. *See* U.S. Const. amend. XXVI; *see also* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168 (2012) (outlining the history of the amendment and Congress's enforcement power).

2. Since passage of the Twenty-Sixth Amendment, Congress has reaffirmed its bipartisan commitment to full enfranchisement for young adults. In 1998, Congress required colleges and universities accepting federal funds to "make a good faith effort to distribute a mail voter registration form" to enrolled students. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 489, 112 Stat. 1581, 1750-51 (codified at 20 U.S.C. § 1094(a)(23)(A)). The Help America Vote Act of 2002 (HAVA) similarly sought to "encourage civic involvement by high school and college students" and combat "the discouragement of our young people from the electoral process," H.R. Rep. No. 107-329, pt. 1, at 35 (2001), by creating a College Program. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 501-502, 116 Stat. 1666, 1717 (codified at 42 U.S.C. § 15521).[12] The program instructed the Election Assistance Commission: (1) "to encourage students enrolled at institutions of higher education

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[12] The House's proposed Voting Technology Standards Act of 2001, which was largely incorporated into the Help America Vote Act, also had as one goal ensuring that students could take advantage of new voting technologies. *See* H.R. Rep. No. 107-263, at 24 (2001).

(including community colleges) to assist State and local governments in the administration of elections by serving as nonpartisan poll workers or assistants; and (2) to encourage State and local governments to use the services of the students participating in the Program." *Id.* § 501.

Most recently, in the Higher Education Opportunity Act of 2008, Congress adapted its requirement that universities provide registration documents by allowing them to distribute those materials by e-mail. *See* Pub. L. No. 110-315, § 493, 122 Stat. 3078, 3308 (2008) (codified as amended at 20 U.S.C. § 1094(a)(23)(D)).

3. The attitude that students "are not members of the community among whom they sojourn," and therefore should not be entitled to vote where they attend school, *Case of Fry*, 71 Pa. 302, 311 (1872), has no rightful place in American law. Heeding this principle, courts have repeatedly struck down laws disenfranchising students. For example, in *Symm v. United States*, 439 U.S. 1105 (1979), this Court affirmed a judgment that imposing a rebuttable presumption of student nonresidence is unconstitutional. *See United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978); *see also Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (enforcing the NVRA's disclosure of records requirements in the face of voter registration problems encountered by students at Norfolk State University); *Williams v. Salerno*, 792 F.2d 323, 328 (2d Cir. 1986) (holding a presumption that a dormitory cannot be a voter's "residence" unconstitutional); *Whatley v. Clark*, 482 F.2d 1230, 1234 (5th Cir. 1973) (holding a rebuttable

presumption of non-residency for students unconstitutional); *Levy v. Scranton*, 780 F. Supp. 897, 903 (N.D.N.Y. 1991) (holding a presumption that on-campus living quarters cannot be a "residence" for voting purposes unconstitutional); *see also Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973) (recognizing that a municipality's decision to hold primary elections during a university's winter vacation may have violated the Fourteenth or Twenty-Sixth Amendments); *Scolaro v. D.C. Bd. of Elections & Ethics*, 691 A.2d 77, 86 (D.C. 1997) (collecting cases).

B. The NVRA Preempts Proposition 200 Because Proposition 200 Introduces New Barriers To Students Who Seek To Register.

Proposition 200 frustrates Congress's twin goals in the NVRA of increasing student turnout and making voter registration uniform. This Court should thus hold that its documentation requirement is preempted.

1. Proposition 200's documentary proof-of-citizenship requirement threatens to deny many students at Arizona universities the ability to register and thus to vote. Specifically, Arizona's law imposes two sorts of burdens. First, Proposition 200 imposes a barrier to registration for students who do not arrive on campus with the requisite documentation, such as a birth certificate or a passport. To be sure, some students will have an Arizona driver license and will be able to satisfy the additional documentation requirement by copying their license number onto the NVRA postcard. There are, however, currently more than 25,000 students

who come from out of state to attend college in Arizona. Arizona State University and the University of Arizona alone have at least 24,900 such students between them. *See ASU Enrollment Data*, Ariz. St. U., http://diversity.asu.edu/asu-diversity (last visited Jan. 17, 2013); *The University of Arizona Fact Book: Students by State 2011-12*, U. of Ariz., http://factbook.arizona.edu/2011-12/students/by_state (last visited Jan. 17, 2013). These recently arrived students are unlikely to possess Arizona licenses, and any license they do carry is unlikely to satisfy Arizona's documentary proof-of-citizenship requirement.[13] Many of these students will, quite sensibly, have left their birth certificates and their passports (if they even have either document) at their parents' home or in a safe-deposit box. *See* Natalie Avon, *Why More Americans Don't Travel Abroad*,

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[13] Even if some other states request documentary proof of citizenship when issuing licenses, whether and under what circumstances Arizona would accept such licenses as satisfactory proof of citizenship is unclear. Even driver licenses sufficient to facilitate international travel throughout North America, which at present are issued by only four states, do not say on their face that the license holder is a U.S. citizen. Instead, they simply contain the word "enhanced"; thus, anyone submitting an enhanced driver license would be at the mercy of an Arizona election official's understanding the format of this out-of-state license. *See Enhanced Drivers Licenses: What Are They?*, Department of Homeland Security, http://www.dhs.gov/enhanced-drivers-licenses-what-are-they (last visited Jan. 15, 2013).

CNN (Feb. 4, 2011) (reporting that only 30% of Americans have passports).[14]

Second, retrieving and duplicating the requisite documentation can pose an obstacle. Many of the students whose documents are kept elsewhere will not be able to count on parents or guardians – who may not have the time, interest, or ability to seek out and copy the documents – to provide them with copies in time to register for an upcoming election.

2. Allowing Proposition 200 to stand would grant states even more leeway to impose restrictions on student voter registration. Indeed, that some states continue to limit student voting suggests that they would seize additional opportunities to do so. For example, in 2008, a registrar of voters in Virginia issued an official release falsely claiming that out-of-state students would lose their entitlement to health care under their parents' plans if they registered to vote in Virginia. *See* Tamar Lewin, *Voter Registration by Students Raises Cloud of Consequences*, N.Y. Times (Sept. 7, 2008).[15] Refusal by many states to treat student IDs as adequate documentation for voting purposes is a particularly salient recent example of state hostility to student

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[14] Available at http://articles.cnn.com/2011-02-04/travel/americans.travel.domestically_1_western-hemisphere-travel-initiative-passports-tourismindustries?_s=PM: TRAVEL.

[15] Available at http://www.nytimes.com/2008/09/08/education/08students.html?_r=0.

voting. *See* Jack Fitzpatrick, *College Students Face New Voting Barriers*, MinnPost (Aug. 16, 2012).[16]

3. Proposition 200 will also hamper campus voter registration drives, contravening Congress's intent to encourage such drives by making voter registration uniform. As the Federal Election Commission observed, "organized voter registration drives may prefer to use the national form when state forms are not readily available or are extremely complex, or where registrants come from many states." 59 Fed. Reg. 32,318 (June 23, 1994); *see generally* Diana Kasdan, Brennan Ctr. for Justice, *State Restrictions on Voter Registration Drives* 3 (2012).[17] In 2012, with Proposition 200 enjoined with respect to federal form registrants, student voter registration in Arizona increased by 7000. *See Cat Tracks: November 8*, Daily Wildcat (Nov. 7, 2012).[18] At the University of Arizona, more than 2000 students registered, thanks to the "largest student registration drive Arizona has ever had." *Id.*

If Proposition 200 is permitted to go into effect again, these drives will no longer be one-stop-shopping operations. Many of the potential registrants will not be carrying documents that satisfy Arizona law when they happen upon a volunteer in their dining hall or student union. Thus,

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[16] Available at http://www.minnpost.com/politics-policy/2012/08/ college-students-face-new-voting-barriers.

[17] Available at http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/.

[18] Available at http://www.wildcat.arizona.edu/article/2012/ 11/cat-tracks-november-8-11812.

the individuals and groups conducting these drives will not be able to simply distribute, collect, and forward the NVRA postcards to registrars as Congress intended. Instead, they must either leave responsibility for obtaining the documentation and submitting the applications on individual voters, with all the problems *amici* have already described, or they must conduct costly and burdensome follow-up operations. If this Court permits Proposition 200 to go into effect, conducting a voter registration drive would accomplish little more than would leaving a stack of forms in a dorm common space.

Moreover, permitting nonuniform registration requirements, like the ones in Proposition 200, threatens the efficacy of college registration drives more broadly. "Dozens of colleges have begun their own voting registration drives in orientation programs, class registration, intranet Web sites and other interactions crucial to campus life, institutionalizing services that had often been left to outside efforts." Steven Yaccino, *Colleges Take a Leap into Voter Registration*, N.Y. Times (Oct. 13, 2012).[19] These drives seek to register students in many different states; some will want to register in the state where they grew up, while others will want to register in the state where they attend college.

If Arizona can tack onto the NVRA postcard a burdensome documentation requirement, then other states can presumably impose their own distinct but

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[19] Available at http://www.nytimes.com/2012/10/14/us/politics/more-colleges-take-a-leap-into-voter registrationhtml?_r=0).

equally onerous requirements. If the organizers of college registration drives cannot rely on a standard form, but must instead provide state-specific applications and assistance, college voter registration drives would simply become impracticable.

The available evidence suggests that the vast majority (87%) of college students who are registered to vote will cast ballots. *Statistics*, Campus Vote Project.[20] This statistic reaffirms Congress's wisdom in reducing barriers to registration. Proposition 200 flouts this wisdom and contradicts Congress's clear intention.

III. The Burdens That Proposition 200 Will Impose On Voting By Qualified Citizens Who Live In Long-Term Care Facilities Reinforce The Conclusion That It Is Preempted By The NVRA.

Residents of long-term care facilities, like military and overseas voters and college students, have historically faced logistical and institutional obstacles to full exercise of the franchise. Congress has sought to improve their access to voter registration facilities and polling places, as well as to make it easier to register and vote by mail. Arizona's Proposition 200 creates new impediments, however, by requiring that many residents of long-term care facilities locate, photocopy, and mail satisfactory documentation of their citizenship. Proposition 200

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[20] http://www.campusvoteproject.org/statistics (last visited Jan. 17, 2013)

thus eliminates much of the benefit of the NVRA for long-term care residents.

A. Congress Has Repeatedly Expressed A Federal Commitment To Facilitating Voting By Elderly And Disabled Citizens.

1. Many residents of long-term care facilities have physical conditions that prevent them from registering or voting in person. Prior to 1984, when in-person registration and voting requirements were the norm, "[t]he most common problem, and for many disabled and elderly citizens the most serious problem, [was] the physical inaccessibility of registration sites and polling places." *Equal Access to Voting for Elderly and Disabled Persons: Hearing on H.R. 1250 Before the Task Force on Elections of the Comm. on H. Admin.*, 98th Cong. 112 (1983) [hereinafter *Hearing on H.R. 1250*] (statement of Institute for Public Representation, Georgetown University Law Center). The prevalence of facilities that had too many steps or were wheelchair inaccessible, for example, resulted in "significant numbers of disabled and elderly citizens with mobility limitations" being excluded from the political process. *Id.*

2. In response, Congress initially enacted the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) in 1984. Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee–1973ee-6). The express purpose of the statute was "to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections." 42 U.S.C. § 1973ee. The VAEHA required

states for the first time to "provide a reasonable number of accessible permanent registration facilities" and "make available registration and voting aids for Federal elections for handicapped and elderly individuals." *Id.* §§ 1973ee-2, -3(a).

Additionally, the VAEHA addressed a prevalent state practice mandating that elderly and disabled voters submit "official" documents in order to obtain an absentee ballot. In 1983, seventeen states required voters with disabilities to submit a doctor's certificate, and twenty states, including Arizona, required notarization for at least one step in the process to vote absentee. *Hearing on H.R. 1250, supra*, at 118-19. The VAEHA scotched these practices by making it illegal in most cases to require notarization or medical certification for disabled voters applying for an absentee ballot. 42 U.S.C. § 1973ee-3(b).

3. The NVRA continues the process of vindicating the voting rights of elderly and disabled voters by requiring states to "accept and use" the Federal Form. *See* 42 U.S.C. § 1973gg-4(a). Congress was aware that the NVRA would make it easier for these citizens to register. *See, e.g.*, 139 Cong. Rec. H505 (daily ed. Feb. 4, 1993) (statement of Rep. Richard Neal) ("These new procedures are also a boon for the elderly and handicapped people who have difficulty getting to a municipal building to register in person.").

B. Proposition 200 Will Exacerbate The Registration Difficulties Already Faced By Arizona Residents Of Long-Term Care Facilities.

Arizona's elderly population is expected to triple by 2050. *See* Patricia Gober, *Geo-Demographics of Aging in Arizona: State of Knowledge* 1 (2002).[21] Much of that growth is the result of Arizona's attractiveness as a retirement destination – more than 47% of Arizona's senior citizens move to the state after they have turned fifty-five. *Id.* Those who come to Arizona from another jurisdiction where they were previously registered to vote face challenges in re-registering when they arrive at their long-term care facility. *See* Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 McGeorge L. Rev. 1065, 1103 (2007).

1. Proposition 200's documentation requirement may by itself foreclose many elderly residents from registering. Arizona law requires any person who has moved to the state, or even anyone who has moved to a different county within the state, to provide documentary proof of citizenship when registering or re-registering to vote. Ariz. Rev. Stat. § 16-166(G)-(H). Given the high percentage of Arizona senior citizens who move to the state after retiring, the registration requirements affect a significant number of Arizona's elderly voters. Even

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[21] Available at http://slhi.org/pdfs/studies_research/CoA_Geo-demographics_of_Aging.pdf.

lifelong Arizona residents, however, must comply with Proposition 200's documentation requirement if they retire or move to a long-term care facility in a different county.

It is hardly surprising that residents of nursing homes are less likely both to have the identification required by Proposition 200 and to be able to access and photocopy it. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 182 (2008) (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.) (recognizing the difficulty that newly arrived elderly residents may face in acquiring identification documents). A 2006 study found that 18% of American citizens over age sixty-five lacked government-issued photo identification. Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (2006).[22] Retirees who move to a long-term care facility from out of state may simply choose not to obtain an Arizona driver license. Similarly, it should go without saying that many persons with physical disabilities will never have obtained a driver license if their impairment prevents them from driving. Finally, the problem of insufficient documentary proof of citizenship may be especially acute for elderly women, considering that "only 66% of voting-age women with ready access to *any* proof of citizenship have a document with [their] current legal name." *Id.* at 2 (emphasis in original).

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[22] Available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

2. Even when documents exist that would satisfy Proposition 200, elderly and disabled voters may face severe practical barriers to registering. First, they must know what Arizona's law requires. *See* Ariz. Rev. Stat. § 16-166(F) (instructing the county recorder to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship"). The instructions for filling out the NVRA postcard mention no requirement to provide supplementary documentation of citizenship. *See* U.S. Election Comm'n, *Register to Vote in Your State by Using This Postcard Form and Guide* 3-4 (2006).[23] Nursing home residents may therefore have to rely on staff, friends, or family to inform them of the additional steps needed to register that are not mentioned in the federal materials.

Second, those who know of the additional requirements still must locate their documents, access and use a photocopier to copy them, and then arrange for those documents to be mailed. Many elderly and disabled citizens likely can navigate the current version of the NVRA postcard, which the Election Assistance Commission designed to be "as 'user friendly' and clear as possible to the applicant." 59 Fed. Reg. 32,312 (June 23, 1994). Yet these same citizens, when confronted by Arizona's new requirement, may understandably find themselves unable to register on their own.

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[23] Available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf.

Prior experience shows that when elderly and disabled citizens require assistance to comply with registration requirements, they are less likely to achieve success. Facility staff face many competing demands on their time that will seem more important than helping residents register to vote. For example, one study found that when local voting officials traveled to nursing homes to facilitate registration and voting, resident participation was far higher than when the responsibility was left to facility staff. *See* Joan L. O'Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. Health Care L. & Pol'y 325, 344-45 (2001). Even those staff currently willing to assist residents would be significantly more burdened under Proposition 200. It is one thing to expect facility staff to help residents fill out a simple form like the NVRA postcard; it is quite another to expect them to search for documents that may not be in files the facility itself maintains and then complete a variety of secretarial tasks.

Worse, many long-term care facilities provide assistance to residents only after the staff conclude, often on the basis of exceptionally subjective criteria, that a would-be voter should retain his voting rights. *See* Kohn, *supra*, at 1073. This self-authorized, ad hoc screening can take many forms – at some facilities, staff will ask residents specific questions on subjects such as current events to assess whether they should vote. *Id.* Other facilities may opt to provide information on voting only to residents that staff deem sufficiently competent. *Id.* Either way, elderly and disabled voters will lose out on the opportunity, which Congress provided under the

NVRA and related statutes, to participate in elections. Because Proposition 200 frustrates Congress's goals in enacting the NVRA and providing for a uniform, easy-to-complete federal form, this Court should hold that Arizona's additional documentation requirement is preempted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-71

IN THE
Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*,
Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF STATE SENATOR RUSSELL PEARCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented is whether Arizona's proof-of-citizenship requirement to register to vote by mail is consistent with the National Voter Registration Act.

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INTEREST OF THE *AMICUS CURIAE*[1]

State Senator Russell Pearce is the author of, and driving force behind the Arizona Taxpayer and Citizen Protection Act, known as "Proposition 200." As the author of Proposition 200, Senator Pearce submits this brief in support of Petitioners and offers his unique perspective as the author of the measure.

During his years in the Arizona State Legislature,[2] Senator Pearce authored numerous historic legislative initiatives designed to protect the citizens of Arizona from the adverse effects of unlawfully present aliens and, most importantly, to uphold the rule of law. These include: Proposition 100, a State constitutional amendment to deny bond to any person unlawfully present in the United States who commits a serious crime in Arizona; Proposition 102, which states that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; the "Legal Arizona Workers Act," upheld by this Court in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (prohibiting employers from hiring unauthorized workers and requiring use of federal E-Verify system to confirm employee eligibility); and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

[2] Senator Pearce was a member of the Legislature for eleven years, including serving as Senate President.

the Support Our Law Enforcement and Safe Neighborhoods Act, known as "SB 1070," the key provision of which was upheld by the Court last Term in *Arizona v. United States*, 132 S. Ct. 2492 (2011).

Senator Pearce's initiatives have served as models for similar legislation in numerous other States across the nation, including numerous common-sense reforms to prevent non-citizens from illegally voting in federal elections. Proposition 200, adopted overwhelming by public initiative in 2004, is one of these measures and was designed to ensure the integrity of our electoral system. Proposition 200 was intended to prevent voting fraud, limit access to certain public benefits by ineligible individuals, and to increase reporting by state and local government officials to federal immigration authorities when they become aware of violations of federal immigration law by those who have unlawfully applied for public benefits.

In regard to the voter registration provision at issue here, Senator Pearce carefully crafted Proposition 200 to rely on the State's authority to set voter eligibility requirements and protect the integrity of the election process. Proposition 200 reflects an entirely common sense precaution adopted by the citizens of Arizona against fraudulent voting by non-citizens. In contrast, the Ninth Circuit's ruling prohibits the use of any form of identification to prevent voter registration fraud other than a mere signature on a federal form.

As author of Proposition 200, Senator Pearce has a direct interest in this matter, and therefore, respectfully submits this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Proposition 200's "proof of citizenship" requirement for voter registration applicants is entirely consistent with the National Voter Registration Act ("NVRA"), as it simply requires an individual seeking to register to vote in federal elections to provide evidence of citizenship. Because Proposition 200 fits comfortably within the plain language of the NVRA, the Ninth Circuit erred in its consideration of and conclusion that Proposition 200 is preempted. To reaffirm that Arizona retains the authority to enact such a common sense measure, this Court should reverse the decision below.

ARGUMENT

Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote. Ariz. Rev. Stat. § 16-166(F). Specifically, Proposition 200 provides that state election officials "shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Such evidence may include a driver's license, a photocopy of a birth certificate or passport, naturalization documents, or "other documents that are meant as proof that [may be] established" pursuant to federal immigration laws.

Contrary to the view of Ninth Circuit, Proposition 200 is entirely consistent with the plain language of the NVRA. Because Proposition 200 was carefully crafted by Senator Pearce in reliance on this fact, the Ninth Circuit should be reversed.

I. The NVRA Does Not Bar States from Requiring Those Registering By Mail to Provide Proof of Citizenship.

Proposition 200's proof-of-citizenship provision is entirely consistent with the NVRA. That federal statute requires States to provide the option of voter registration by mail for federal elections by completion of the "National Mail Voter Registration Form" ("the Federal Form"). To assure that only eligible citizens register to vote using the Federal Form, Arizona requires an additional form which requires proof of citizenship.

A. The Statutory Text Plainly Allows Arizona to Develop and Use Its Own Form.

While still required to accept and use the Federal Form, a State is expressly authorized to develop and use its own registration form in certain circumstances. The plain text of the NVRA authorizes a State to "develop and use a mail voter registration form . . . for the registration of voters in elections for Federal office," in addition to the Federal Form, if it "meets all of the criteria stated in section 1973gg-7(b)." 42 U.S.C. § 1973gg-4(a)(2). These criteria include a requirement that a mail

voter registration form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to *assess the eligibility* of the applicant . . ." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Section 1973gg-7(b)(2) then specifies that citizenship is a necessary eligibility requirement.

Thus, the NVRA expressly permits Arizona to require proof of eligibility, including proof of citizenship, because "it is identifying information . . . necessary to enable the . . . State election official to assess eligibility." 42 U.S.C. § 1973gg-7(b)(1). It is undisputed that Arizona also accepts and uses the Federal Form. In effect, the NVRA sets a minimum requirement reflected in the Federal Form but also allows a State to require more, as long as it is within the bounds of § 1973gg-7(b). An additional State form requiring proof of citizenship is entirely within the bounds of the statute. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . [and if so,] the sole function of the courts is to enforce it according to its terms.").

Significantly, while a State form must comply with the same general standards as the Federal Form, there is no mandate that states are limited to the information included in the Federal Form or that the Federal Form is a complete application. 42 U.S.C. § 1973gg-4(a)(2). A State has discretion to develop and use a form of its own design, as long as it is consistent with § 1973gg-7(b). Thus, the statute

expressly authorizes a State, consistent with the standards set forth in § 1973gg-7(b), to require additional information outside of the Federal Form for voter registration.

B. The "Accept and Use" Requirement of the Federal Form Does Not Prohibit Additional Requirements.

The Ninth Circuit concluded that the "accept and use" provisions of the NVRA were in conflict with the proof-of-citizenship requirement of Proposition 200. In fact, the "accept and use" requirements of the Federal Form (§ 1973gg-4(a)(1)-(2)) do not prohibit requirements beyond those included in the Federal Form. Section 1973gg-4(a)(2) makes clear that a State is not limited to only the Federal Form for federal voter registration. The plain text of the statute allows Arizona to develop its own form to require proof-of-citizenship in elections for federal office, as it has done through Proposition 200.

It is undisputed that Arizona uses the Federal Form for registration of voters in federal elections. The requirement to "accept and use" the Federal Form does not preclude states from imposing additional requirements. The only real issue then is whether Proposition 200's requirement of proof of citizenship so conflicts with the use of the Federal Form that the requirement of proof of citizenship that it is preempted. The Ninth Circuit concluded that the NVRA preempts the proof-of-citizenship requirement, because the NVRA requires states to "accept and use" the Federal Form and Proposition

200's requirement to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship . . . do not operate harmoniously. . . ." *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012) (citing Ariz. Rev. Stat. § 16-166(F)). This conclusion was based on a misreading of the statutes.

First, it is beyond dispute that the NVRA explicitly allows states to develop and use a form "*[i]n addition* to accepting and using the [Federal Form]." 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Moreover, no provision of the NVRA prohibits States from requiring additional identifying documents to verify a voter's eligibility. In fact, the NVRA only expressly prohibits states from requiring "notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, (2003) (citation omitted) ("We . . . read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. . . ."). Thus, while the NVRA prohibits requiring notarization or other formal authentication, it notably does not prohibit proof-of-citizenship, while expressly recognizing its importance in voter registration. 42 U.S.C. § 1973gg-7(b); *see also Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 838 (2010) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and citation omitted)).

The NVRA also does not provide that it is the *exclusive* authority on eligibility verification or that, as the Ninth Circuit contended, "Arizona's *only* role was to make [the Federal] [F]orm available to applicants and to 'accept and use' it for the registration of voters." 677 F.3d 398 (emphasis added). The language of the statute not only does *not* prohibit additional documentation requirements, it permits states to "require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant . . ." 42 U.S.C. § 1973gg-7(b)(1).

Besides express authorization for a state to "develop and use" a form compliant with the statute's criteria (42 U.S.C. § 1973gg-4(a)(2)), the NVRA also provides that "each State shall establish procedures to register to vote in elections for Federal office . . . (2) by mail application pursuant to section 1973gg-4 of this title, . . . *in addition to any other method of voter registration provided for under State law*," *id.* § 1973gg-2(a) (emphasis added). Although the NVRA requires that states "accept and use" the Federal Form, *id.* § 1973gg-4(a)(2), the NVRA does not foreclose states from using other methods for registering voters, *id.* § 1973gg-2(a), and allows states to develop and use state specific forms, if those forms fit within set criteria, *id.* § 1973gg-4(a)(2). Therefore, Congress did not "assume exclusive control of the *whole* subject . . . ." *Ex Parte Siebold*, 100 U.S. 371, 383 (1879) (emphasis in the original).

Arizona is plainly permitted to require proof of citizenship for federal voter registration because of its expressly granted authority to develop and use a form complying with § 1973gg-7(b) and may deny voter registration for federal elections for lack of such proof. *See id.* at 392 ("[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State . . . .").

II. If Upheld, The Ninth Circuit's Ruling Would Impose a Significant Burden on Arizona and Other States.

The Ninth Circuit's conclusion would have the effect of imposing a significant new burden on voter registration in Arizona and other States. For example, a person in Arizona that completes the Federal Form, but lacks proof of citizenship, would have to be allowed to vote for federal officials but could not vote for State officials. States that desire a proof-of-citizenship requirement in their State forms (as the Ninth Circuit seemed to conclude is allowed by the NVRA), would be required to determine which election (federal, state, or both) in which residents are permitted to vote. This creates a significant new burden on States and a confusing result that is certainly not anticipated in the NVRA.

The Ninth Circuit also failed to give any weight to the stated goal of the NVRA to "protect the

integrity of the electoral process" and "enhance the participation of *eligible* citizens as voters in elections for Federal office" as guiding purposes of the statute. 42 U.S.C. § 1973gg(b) (emphasis added). Proposition 200's proof-of-citizenship requirement is fully in accord with these important purposes. Under no sensible reading of the statute is the goal of election integrity advanced by allowing non-citizens to vote.

In sum, the Ninth Circuit's holding turns on § 1973gg-4(a)(1)'s requirement that states "accept and use" the Federal Form. However, § 1973gg-4(a)(2) also plainly allows a state to "develop and use" its own form if it complies with the standards set forth in § 1973gg-7(b). Because Proposition 200 is plainly consistent with these standards, it is entirely harmonious with the NVRA.

CONCLUSION

For the foregoing reasons, Senator Pearce respectfully requests that this Court reverse the Ninth Circuit's decision and hold that Proposition 200 is not preempted by federal law.

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